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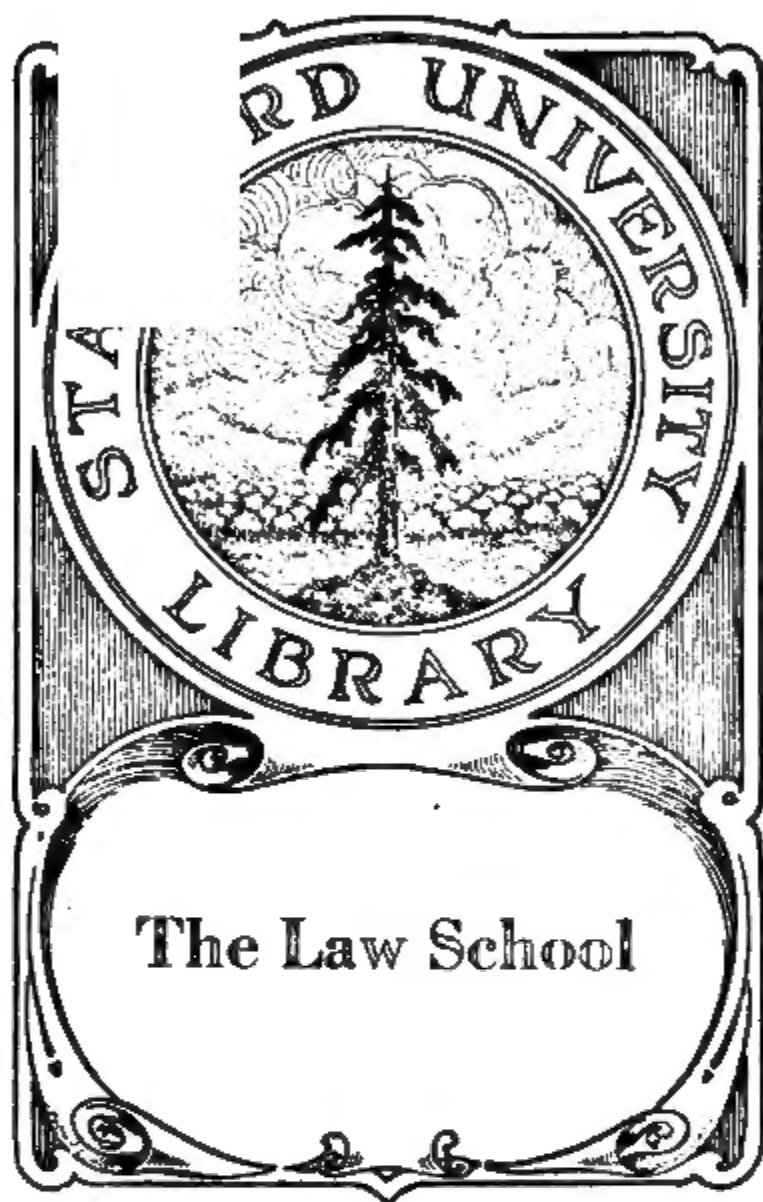
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**THE  
LAW OF CONTRACTS**

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**IN FOUR VOLUMES**

**VOLUME II**

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# TABLE OF CONTENTS

## VOLUME II

### BOOK IV

#### *PERFORMANCE OF CONTRACTS*

#### CHAPTER XXI

#### **GENERAL RULES FOR THE INTERPRETATION OR CONSTRUCTION OF CONTRACTS AND THE PAROL EVIDENCE RULE**

[ References are to sections ]

	Section
Necessity for interpretation of contracts . . . . .	601
Construction and interpretation . . . . .	602
Possible standards of interpretation . . . . .	603
Different standards of interpretation must be applied to different classes of contracts . . . . .	604
Standard of interpretation for informal agreements . . . . .	605
Formal and written contracts may exist though parties attach different mean- ings to the language . . . . .	606
Standard of interpretation where a writing has been adopted . . . . .	607
The local standard is preferable to the normal standard . . . . .	608
Clear and unambiguous words . . . . .	609
Intent of the parties where the contract is written is ineffective unless ex- pressed in the writing . . . . .	610
An exclusively mutual standard is not applicable . . . . .	611
Codes and abbreviations . . . . .	612
Meaning peculiar to the parties may be given to words if the words appro- priately express that meaning . . . . .	613
Technical meaning is sometimes given to language in violation of apparent intention . . . . .	614
Adoption of existing law into a contract . . . . .	615
Respective functions of the court and the jury . . . . .	616
Methods of determining the local meaning of a writing . . . . .	617
Primary rules of interpretation . . . . .	618
Secondary rules: The main purpose of the instrument will be given effect . . .	619
Secondary rules: The instrument will be construed if possible so that it shall be effective and reasonable . . . . .	620

Latent and patent ambiguities . . . . .	627
Interpretation of several connected writings . . . . .	628
Surrounding circumstances may always be shown . . . . .	629
Previous negotiations . . . . .	630
Parol evidence rule . . . . .	631
Scope of the rule . . . . .	632
Integration depends upon intent . . . . .	633
It may be shown that the writing has never become effective . . . . .	634
Absolute written transfer may be proved by parol to be a mortgage . . . . .	635
An incomplete writing may be added to by parol . . . . .	636
There may be entirely distinct contemporaneous oral and written agreements . . . . .	637
Test for determining whether an oral agreement is so far separate and collateral as to be admissible . . . . .	638
Collateral parol agreements contradicting a written contract are inadmissible . . . . .	639
Collateral agreements contradicting an implication of law . . . . .	640
Other inadmissible collateral agreements . . . . .	641
Admissible collateral agreements . . . . .	642
Parol evidence of a warranty . . . . .	643
Agreements collateral to negotiable paper . . . . .	644
Agreements collateral to deeds . . . . .	645
The parol evidence rule does not exclude oral agreements alone . . . . .	646
Applications of the parol evidence rule to third persons . . . . .	647

## § 601. Necessity for interpretation of contracts.

The only question of interpretation with which this treatise is concerned relates to contracts. Interpretation of wills or of statutes may involve different principles.<sup>1</sup>

[The interpretation of a contract is the process of determining from the expressions of the parties what external acts must happen or be performed in order to conform to what the law considers their will.] Generally, the question of interpretation does not arise broadly but concerns only a particular act or forbearance of one or both of the parties which has been made

<sup>1</sup> So the question of the meaning of an entry made in the usual course of business which a witness seeks to use may involve a different principle, since it is wholly a unilateral act. In *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461, 59 Atl. 499. the words "on contract" appeared in a book of original entries offered by the plaintiff in support of its claim. The court allowed testimony that these words had "a well defined meaning in the

plaintiff's business" and always denoted "a conditional lease or sale." It was as proper, the court said, "as if a private cipher had been used, it would have been to explain that." It will be observed that the witness could have given oral testimony that a conditional lease or sale was involved; and if he was accustomed to make a cross or write the words "on contract" whenever he made such a sale, he could presumably show that also.

the subject of litigation or dispute. Acts as well as words may be used in the formation of contracts, and acts as well as words must be interpreted. A wave of the hand, as well as a sentence may be ambiguous. Only on the supposition that every act or word in the formation of a contract can have but one possible sense can interpretation lose its importance. Even on this supposition interpretation still is a logical necessity, but would be involved in learning the language. Blackacre, whether the word is spoken or written, is not the same thing as a certain piece of ground which goes by that name, even though no other land is so called; and the law must decide in any litigation on a contract referring by name to Blackacre that the word is applicable to some particular piece of land.<sup>2</sup>

[Interpretation does not include the discovery of all the effects which the words or symbols used by the parties may have upon the external world. The law may attach consequences to these words or symbols for other reasons than because the parties appear to wish those consequences.] A mortgage may provide in terms that the mortgaged property shall be forfeited if the debt is not paid on the law day. This provision will not be enforced. The mortgagor will be allowed a right of redemption,<sup>2a</sup> but it is a vicious terminology which would classify this legal effect of the mortgage upon the mortgaged property as within the scope of interpretation or construction.

## § 602. Construction and interpretation.

A distinction has been taken between the interpretation of contracts and their construction.<sup>3</sup> Interpretation is thus defined: "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them

<sup>2</sup> "We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. 'In every case, the words used must be translated into things and facts by parol evidence.' Holmes, J., in *Doherty v. Hill*, 144 Mass. 468, 11 N. E. 583; *Mead v.*

*Parker*, 115 Mass. 413, 15 Am. Rep. 110, 4 Wigmore on Evidence, § 2454." Cardozo, J., in *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139, 141.

<sup>2a</sup> *Seton v. Slade*, 7 Ves. 264, 273.

<sup>3</sup> Lieber, *Hermeneutics* (Hammond's ed.), 11, 44. See also 2 Elliott, *Contracts*, § 1505.

**TABLE OF CONTENTS**  
**[ References are to sections ]**

	Section
After election to continue a contract in spite of a known excuse, the excuse cannot be asserted . . . . .	688
Waiver of condition not yet broken or defence not yet arisen . . . . .	689
Waiver of promise before maturity . . . . .	690
A promissory estoppel does not require an intent to surrender a right . . . . .	691
Knowledge of facts is not necessary for a promissory estoppel . . . . .	692
Agreement to be liable in spite of a defence already accrued . . . . .	693
Agreement to discharge from a liability already arisen . . . . .	694
Laches . . . . .	695
Whether intention is essential for gratuitous surrenders or for laches . . . . .	696
Knowledge of facts is necessary to make binding a promise to give up an accrued defence or to constitute laches . . . . .	697
Ignorance of the legal effect of known facts is not material except in the case of laches . . . . .	698
Illustration of the foregoing principles: Building contracts . . . . .	699
Acceptance of defective performance of a contract to sell goods does not necessarily indicate release of liability for defective performance . . . . .	700
If goods are offered as full satisfaction they must be taken as such if taken at all . . . . .	701
Acceptance of defective performance by a buyer . . . . .	702
The buyer may sue for defective quantity . . . . .	703
The buyer may sue for delay in performance . . . . .	704
Circumstances under which the buyer may have a right to sue for defective quality . . . . .	705
Buyer's agreement to surrender his right must be proved as a fact . . . . .	706
Effect of retention without complaint . . . . .	707
In some states acceptance of title waives right of damages for inferior quality . . . . .	708
Difficult position of the buyer under this rule . . . . .	709
Exceptional cases where acceptance of goods does not preclude subsequent objection . . . . .	710
Nature of warranty as affecting the consequences of accepting goods . . . . .	711
What is meant by express warranty in this connection . . . . .	712
Right of objection to latent defects is not lost . . . . .	713
Provisions of the Uniform Sales Act . . . . .	714
Damages recoverable by the buyer . . . . .	715
Express provisions of the contract . . . . .	716
Rule of the Civil law . . . . .	717
Rescission of acceptance . . . . .	718
Acceptance of part of goods tendered . . . . .	719
Whether acceptance of part is acceptance of the whole . . . . .	720
Effect of seller's assent to buyer's acceptance of part . . . . .	721
Sales on approval or with right to return . . . . .	722
Acceptance of defective performance under a contract to sell real estate . . . . .	723
Acceptance of defective performance under a contract for work or construction . . . . .	724
Continuance of contract of employment after cause for discharge is known . . . . .	725
Waiver of conditions in subscriptions to stock . . . . .	726
Surrender of rights accompanied by delivery of tangible property . . . . .	727
Discharge of seller's lien in sales of chattels . . . . .	728

## TABLE OF CONTENTS

vii

[ References are to sections ]

	Section
Waiver of vendor's lien on real estate.....	729
Waiver of the condition of payment in a cash sale.....	730
Giving the buyer a right to use the goods as his own, indicates transfer of title.....	731
Effect of giving a worthless check.....	732
Summary of principles governing transfer of property without performance of conditions in cash sales.....	733
Waiver in conditional sales—nature of such sales.....	734
A conditional seller may recover the price though title has not passed.....	735
Conditional seller's election of remedies.....	736
Analogy of mortgage.....	737
Invalidity of reasons for distinguishing conditional sales from mortgages.....	738
Surrender of title by estoppel.....	739
Discharge of covenants restricting the use of real estate by promissory estoppel or laches.....	740
Whether consent to breach of condition on one occasion excuses similar future breaches.....	741
Whether stating one ground of defence discharges other grounds.....	742
When refusing tender or demand on one ground, precludes setting up other reasons.....	743
Application of the principle to contracts of sale, insurance and employment....	744
Conditions in insurance policies.....	745
Meaning of void and voidable.....	746
Classification of cases where insurer's conduct has been thought to preclude insistence on a condition or excuse.....	747
The insurer's conduct when the policy is issued.....	748
Decisions holding that the parol evidence rule forbids enforcement of a parol waiver contemporaneous with the creation of a written contract.....	749
Contrary decisions.....	750
Presumption of knowledge on the part of the insurer of invalidating facts at the time of issuing the policy.....	751
Waiver of condition after the issue of the policy.....	752
Whether inaction by an insurer after knowledge of a breach of condition waives the breach.....	753
Insurer's right to premiums after a breach avoiding a policy.....	754
Life insurance.....	755
Cases where the premium has been already paid.....	756
Right of insurer to retain the premium when the policy is avoided.....	757
No affirmative action on the part of the insurer is generally necessary in order to avoid a policy for breach of condition.....	758
Necessity of written modification or waiver of conditions in policy.....	759
Express limitation on powers of agents to waive conditions.....	760
Whether an ineffectual attempt to collect a premium deprives the insurer of a known defence.....	761
Temporary breach of warranty or condition.....	762
Waiver after loss.....	763
Requesting proof of loss or appraisal.....	764
Non-waiver agreements.....	765
Whether a breach of condition avoids an entire policy insuring several articles.	766

[ References are to sections ]

	Section
Excuse of conditions by conduct showing that the promisor will not perform even if the condition is performed . . . . .	767
Conditions precedent as well as conditions concurrent are excused by the promisor's prospective non-performance . . . . .	768

## CHAPTER XXV

### EXCUSE OF CONDITIONS AND PROMISES WHICH WOULD CAUSE A FORFEITURE OR PENALTY

What is meant by a forfeiture . . . . .	769
What is meant by penalty . . . . .	770
Non-enforceability of provisions for forfeiture in mortgages . . . . .	771
Conditional sales distinguished from mortgages . . . . .	772
Technicality of the distinction . . . . .	773
Relief from penalties in bonds . . . . .	774
Early history of the jurisdiction of equity to relieve from forfeiture and penalties . . . . .	775
Provisions for penalty are invalid in any contract . . . . .	776
How far the question of penalty or liquidated damages is one of construction . . . . .	777
Intention of the parties . . . . .	778
Whether the liquidation must be reasonable . . . . .	779
Distinction between contracting in advance for a penalty and making an unreasonable accord after breach . . . . .	780
Alternative contracts . . . . .	781
The form of a contract cannot make a penalty enforceable . . . . .	782
Rules aiding the court in determining whether a sum is liquidated damage . . . . .	783
Classification by Somerville, J., and by Lord Dunedin . . . . .	784
Reasonable stipulated damages per day for delay are enforceable . . . . .	785
Stipulation for attorney's fees . . . . .	786
Other illustrations . . . . .	787
Whether the tendency of the court is to hold a doubtful provision a penalty or liquidated damages . . . . .	788
Prevention of performance makes provision for liquidation inoperative . . . . .	789
Deposits . . . . .	790
Instalment contracts . . . . .	791
Civil law . . . . .	792
A condition may involve a penalty or forfeiture . . . . .	793
Excuse for non-performance of a condition requiring a certificate of an architect or engineer . . . . .	794
Distinction between certificates in building contracts and under insurance policies . . . . .	795
Effect of the architect's death . . . . .	796
Unreasonable but not fraudulent refusal of certificate . . . . .	797
A builder may be liable though he has received an architect's certificate . . . . .	798
Where a debt has arisen, a condition relating to the time of payment which becomes impossible is dispensed with . . . . .	799

## TABLE OF CONTENTS

ix

[ References are to sections ]

	Section
Effect of a condition requiring valuation—transfer of property.....	800
Failure of valuation without fault of either party.....	801
How far the valuation is conclusive upon the parties.....	802
Failure of valuation owing to the fault of either party.....	803
Promises to pay when able.....	804
Substantial performance.....	805
Relief from conditions is not wholly a matter of construction.....	806
Conditions are enforced more strictly if no forfeiture is caused.....	807
Impossibility does not excuse breach of condition precedent.....	808
Impossibility of performing conditions subsequent.....	809
Impossibility of performing the condition of a bond.....	810
Effect of agreement in contract excluding excuses.....	811

## CHAPTER XXVI

### NON-PERFORMANCE OF A COUNTER-PROMISE AS AN EXCUSE FOR BREACH OF PROMISE

The problem suggested in this chapter is confined to bilateral contracts.....	812
Various methods of dealing with the problem.....	813
Meaning of failure of consideration.....	814
Differences in effect of the different theories.....	815
Under the early law mutual promises were independent.....	816
Lord Mansfield introduced the doctrine of mutual dependency.....	817
Boone v. Eyre.....	818
Purdage v. Cole.....	819
Serjeant Williams' Rules.....	820
Comment on Serjeant Williams' first two Rules.....	821
Comment on Serjeant Williams' Rules 3, 4, and 5.....	822
Criticism of the general theory of Serjeant Williams' Rules.....	823
Intent of the parties controls if expressed.....	824
Fictitiously imputed intentions.....	825
Intention must relate to the time of the formation of the contract.....	826
Implied conditions if based on intention must be given strict effect.....	827
Promises called absolute are generally not strictly so.....	828
Order of time of performances.....	829
Order of performances when one or both take time.....	830
When performance on one side requires an indefinite time.....	831
Readiness and willingness.....	832
What amounts to an offer to perform.....	833
Tender is not necessary in equity unless time is of the essence.....	834
When concurrent conditions are implied.....	835
Effect of the place of performance on concurrent conditions.....	836
Concurrent conditions are not necessarily mutual.....	837
Failure to perform on the part of the plaintiff owing to excusable impossibility.....	838
Ignorance of the plaintiff's breach of contract when the defendant fails to perform.....	839

**[ References are to sections ]**

	<b>Section</b>
Promises in separate contracts.....	840
Part performance on one side.....	841
Substantial performance.....	842
Benefit derived by the defendant from the plaintiff's part performance.....	843
Breach in limine.....	844
Distinction between breach as to the time of performance and as to character of performance.....	845
Meaning of time being of the essence.....	846
A breach in limine as to time is fatal in contracts of sale.....	847
Whether the time for the payment of money is of the essence.....	848
Time in building contracts.....	849
Time is not of the essence in contracts of service.....	850
When time is essential in performing collateral stipulations.....	851
In equity time is not generally of the essence.....	852
Time is of the essence in equity in a contract of option.....	853
Time is of the essence even in equity if the property is of speculative or fluctuating value.....	854
Statutory adoption of the equity rule.....	855
Delay may be waived.....	856
Hour of performance.....	857
Partly bilateral contracts.....	858
Mutual debts do not cancel one another.....	859
General dependency and particular dependency.....	860
Divisible contracts—meaning of the term.....	861
When a contract will be construed as divisible.....	862
When transactions constitute several contracts.....	863
Conditions implied in divisible contracts.....	864
English test of intent to repudiate.....	865
Materiality of the breach is the true test.....	866
American decisions.....	867
Defect in quality of an instalment.....	868
Right temporarily to withhold performance distinguished from right to refuse absolutely.....	869
Effect of part performance of a divisible contract.....	870
Whether the party first in default can ever recover.....	871
Effect of stating a price for part of the performance in a contract not wholly divisible.....	872
A bilateral contract to form a future contract or sale.....	873
Distinction between performance and preparation for performance.....	874
Prospective breach of promise excuses performance of the counter promise..	875
Prospective failure of consideration where conditions are concurrent.....	876
Prospective inability.....	877
The seller's lack of title to specific property excuses the buyer.....	878
Encumbered or incomplete title.....	879
Insolvency or bankruptcy.....	880
Inability to perform unless the other party performs.....	881
Both parties unable or unwilling to perform.....	882
Rules of damages provide for cancellation of mutual obligations to exchange performances.....	883

## TABLE OF CONTENTS

xi

[ References are to sections ]

	Section
An accrued right of action for breach of contract may be discharged by the plaintiff's subsequent inability to perform.....	884
Actual or threatened failure of consideration will discharge liability already accrued.....	885
Reviving of seller's lien upon actual or threatened failure of consideration ...	886
Beecher v. Conradt .....	887
Aleatory contracts.....	888
When performances in bilateral contracts are in exchange for one another ....	889
Covenants in leases are independent.....	890
Eviction.....	891
Constructive eviction.....	892
Conditions implied in fact.....	893
Promises impliedly conditional upon notice.....	894

## CHAPTER XXVII

### DEPENDENCY OF MUTUAL PROMISES IN THE CIVIL LAW

Mutual promises were independent in the early Roman law.....	895
Passages in Digest and Code.....	896
Inconsistency of dependency and rule governing risk of loss.....	897
Right of rescission in the Roman law.....	898
General provisions of the French law.....	899
Application for dissolution must be made to the court.....	900
Discretion of the court in granting dissolution.....	901
Delayed or imperfect performance.....	902
Part performance and immaterial breach.....	903
Waiver, and right to damages.....	904
Prospective non-performance.....	905
Dissolution takes effect by relation.....	906
Influence of the French law in other countries.....	907
German Common law.....	908
Provisions of the Commercial Codes.....	909
Provisions of the German Civil Code.....	910
Effect of the statutory provisions.....	911
Exceptio non adimpleti contractus.....	912
Exceptio non rite adimpleti contractus.....	913
How far the defence is merely dilatory.....	914
Whether the plaintiff must have performed completely.....	915
Whether the defence is applicable in case of impossibility.....	916
Defence excluded by tender or prevention.....	917
Acceptance of defective performance.....	918
Prospective breach.....	919
Diminution of the price.....	920
Austrian law.....	921

[ References are to sections ]

## BOOK V

*PARTICULAR CLASSES OF CONTRACTS*

## CHAPTER XXVIII

## CONTRACTS FOR THE SALE OF LAND

	Section
Implied as well as express promises must be considered . . . . .	922
A vendor of land must give a marketable title . . . . .	923
The vendor must prepare the deed . . . . .	924
Form of deed necessary to fulfil the contract . . . . .	925
There are no implied warranties in sales of real estate . . . . .	926
Ownership of the purchaser in equity . . . . .	927
Risk generally thrown upon the purchaser . . . . .	928
Maxims on which the English rule is based . . . . .	929
Illustrations of the purchaser's equitable ownership . . . . .	930
Rule in regard to risk is equitable . . . . .	931
Exceptions to the English rule . . . . .	932
English doctrine originated when mutual promises were independent . . . . .	933
The result of law and in equity should be the same . . . . .	934
Partial destruction . . . . .	935
Comment on illustrations of purchaser's equitable ownership . . . . .	936
Rules tending to show a vendor is not a mortgagee . . . . .	937
Inconsistency of foregoing rules with purchaser's ownership . . . . .	938
Intent to transfer ownership should control the question . . . . .	939
Risk should pass to the purchaser on transfer of possession . . . . .	940
English rule is not based on intention . . . . .	941
Practical advantages of leaving risk with the vendor in possession . . . . .	942
English rule disregards analogies . . . . .	943
Risk in leased property . . . . .	944
Distinction between total and partial destruction of leased property . . . . .	945
Comparison of a lease with a contract to sell . . . . .	946
Risk of loss in the Roman law was on the buyer . . . . .	947
Until there was <i>emptio perfecta</i> the risk was on the seller . . . . .	948
Effect of negligence or default . . . . .	949
Reasoning of the older writers inconsistent with dependency in bilateral con- tracts . . . . .	950
Reasons advanced by modern writers . . . . .	951
Subsidiary questions . . . . .	952
The modern continental law leaves the risk with the seller until transfer of title or possession . . . . .	953
The buyer's right is purely personal . . . . .	954

## TABLE OF CONTENTS

xiii

[ References are to sections ]

### CHAPTER XXIX

## CONTRACTS FOR THE SALE OF PERSONAL PROPERTY

	Section
Duty of delivery and payment . . . . .	955
Place, time, and manner of delivery . . . . .	956
Delivery to a carrier on behalf of the buyer . . . . .	957
Delivery of wrong quantity . . . . .	958
Right to examine the goods . . . . .	959
Buyer is not bound to return goods wrongly delivered . . . . .	960
Risk of loss—under the Sales Act . . . . .	961
Risk generally attends title . . . . .	962
Risk may by agreement be separated from title . . . . .	963
Risk is on the buyer where the seller retains a security title only . . . . .	964
Risk is on the buyer in a conditional sale . . . . .	965
Risk where goods are shipped under a bill of lading . . . . .	966
Effect of default upon risk . . . . .	967
Requirements of warranty under the English Law . . . . .	968
Suggested tests of a collateral warranty . . . . .	969
Definition of express warranty . . . . .	970
Intent to warrant . . . . .	971
Reliance of the buyer—obvious defects . . . . .	972
Inspection . . . . .	973
Statements before or after the bargain . . . . .	974
Implied warranties of title under Sales Act . . . . .	975
No implied warranty of title in early law . . . . .	976
Warranty of title in America . . . . .	977
Limitations on implied warranty of title . . . . .	978
Sales by one not professing to be owner . . . . .	979
When the cause of action arises . . . . .	980
Rule of the Civil law . . . . .	981
Implied warranty of quality in the Sales Act . . . . .	982
No implied warranty of quality in the early law . . . . .	983
Executory and executed agreements . . . . .	984
Specified goods and unspecified goods . . . . .	985
The seller a manufacturer . . . . .	986
The seller a dealer . . . . .	987
Inspection . . . . .	988
Fitness for a particular purpose . . . . .	989
Known, described and definite articles . . . . .	990
The seller's obligation is not based on negligence . . . . .	991
Subsidiary warranties by manufacturer . . . . .	992
Exclusion of implied warranty . . . . .	993
Meaning of manufacturer . . . . .	994
Food; early law . . . . .	995
Food; modern law . . . . .	996

[ References are to sections ]

	Section
Restaurant keeper's liability . . . . .	996a
What is meant by merchantable . . . . .	997
Warranty not available to subpurchaser . . . . .	998
Warranty in the Civil law . . . . .	999
Warranties in sales by sample—under the Sales Act . . . . .	1000
There may be a contract to sell or a sale by sample . . . . .	1001
A sample is a term of the contract . . . . .	1002
The sample as a representation as to the bulk . . . . .	1003
The sample not always a representation as to the bulk . . . . .	1004
Buyer's right of inspection . . . . .	1005
Merchantability . . . . .	1006
Implied warranty in sale by description . . . . .	1007
What is meant by sale by description . . . . .	1008
Warranty in sales by description . . . . .	1009
Sales to arrive . . . . .	1010
Extent of the seller's obligation in a sale to arrive . . . . .	1011

## CHAPTER XXX

### CONTRACTS OF EMPLOYMENT AND CONTRACTS TO MARRY

Principal and agent, and master and servant . . . . .	1012
Duties of the employer and employee to one another . . . . .	1013
Diligent and skilful service . . . . .	1014
Duty to employ . . . . .	1015
Agents' duty to obey instructions . . . . .	1016
Servants' duty of obedience . . . . .	1017
Limits of servants' duty of obedience . . . . .	1018
Liability of a principal for default of a sub-agent . . . . .	1019
Duty in regard to proper behavior . . . . .	1020
Employee's duty to account . . . . .	1021
The employee's duty of fidelity to his employment . . . . .	1022
Employee is chargeable as trustee with anything fraudulently acquired . . . . .	1023
Effect of the Statute of Frauds on agent's duty in regard to real estate . . . . .	1024
Employee's duty in regard to information acquired by him . . . . .	1025
Employee's right to indemnity . . . . .	1026
Notice of intent to terminate contract of employment . . . . .	1027
Compensation . . . . .	1028
Attorney and client . . . . .	1029
Compensation by the piece or by commission . . . . .	1030
Contracts to marry . . . . .	1031

[ References are to sections ]

CHAPTER XXXI

CONTRACTS OF BAILMENT AND OF INNKEEPERS

	Section
Definition of bailment.....	1032
Kinds of bailment.....	1033
Mutual rights and duties of bailor and bailee.....	1034
The bailee's obligation to redeliver.....	1035
How far a bailee can deny his bailor's title.....	1036
Exceptional rule governing carriers suggested.....	1037
A bailment without reward for the care of the bailor's goods.....	1038
A gratuitous loan for use by the bailee.....	1039
Bailments for mutual benefit.....	1040
Lending for hire.....	1041
Pledge.....	1042
Enforcement of the pledgee's claim.....	1043
Rights and duties of pledgor and pledgee.....	1044
Hired service or storage of property.....	1045
The issue and form of warehouse receipts.....	1046
Negotiable and non-negotiable receipts.....	1047
When the warehouseman is bound to deliver.....	1048
When the warehouseman is justified in delivering, and his liability for mis- delivery.....	1049
Cancellation of receipts on delivery of goods.....	1050
Effect of alteration.....	1051
Delivery of goods when receipt is lost.....	1052
Effect of a duplicate receipt.....	1053
Adverse claims to goods.....	1054
Warehouseman is liable for the non-existence or misdescription of goods.....	1055
Warehouseman's duty of care of goods.....	1056
Remedies of bailor's creditors.....	1057
Warehouseman's lien.....	1058
How receipts may be negotiated.....	1059
Transfer of receipts without negotiation.....	1060
Who may negotiate and the effect of negotiation.....	1061
Effect of transfer of receipt.....	1062
Warranties on assignment of receipt.....	1063
Effect of fraudulent negotiation.....	1064
Definition of terms in the Act.....	1065
Innkeepers.....	1066
Who are guests.....	1067
Innkeepers' obligations in regard to guests' property.....	1068
Limitations of innkeepers' liability in regard to guests' property.....	1069
Innkeepers' obligations in regard to guests' comfort and safety.....	1070

[ References are to sections ]

## CHAPTER XXXII

## CONTRACTS OF AFFREIGHTMENT

	Section
Contracts of carriers . . . . .	1071
Definition of a common carrier . . . . .	1072
Limitation of carriers' capacity to contract . . . . .	1073
Demise of vessel distinguished from ordinary charter party . . . . .	1074
Mutual obligations under charter parties . . . . .	1075
A charter party contemplates a double transaction . . . . .	1076
Express warranties . . . . .	1077
Implied warranties. Seaworthiness . . . . .	1078
Implied obligation to prosecute the voyage promptly and without deviation . . . . .	1079
Effect of breach of warranty . . . . .	1080
Definition of a bill of lading . . . . .	1081
Signature of the parties . . . . .	1082
Order bills of lading and straight bills of lading . . . . .	1083
Issue of bills of lading . . . . .	1084
Preparation of bills of lading by shippers . . . . .	1085
Bills in sets . . . . .	1086
Desirability of uniformity in bills of lading . . . . .	1087
Threefold importance of bills of lading . . . . .	1088
Liability of a carrier for destruction of goods . . . . .	1089
What is an act of God . . . . .	1090
Animals . . . . .	1091
Public enemies; restraint of princes . . . . .	1092
Inherent vice . . . . .	1093
Seizure by legal process . . . . .	1094
A carrier is not liable for delay unless unreasonable . . . . .	1095
If the carrier's fault is a contributing cause of a loss, the carrier is liable . . . . .	1096
Obligations commonly assumed by shipowner . . . . .	1097
Charterer's duty to furnish a cargo . . . . .	1098
Duty to load and unload . . . . .	1099
When lay days begin . . . . .	1100
Freight or hire . . . . .	1101
Effect of breach of promise in a charter party . . . . .	1102
When an excepted peril discharges a contract entirely . . . . .	1103
When a common carrier's liabilities for goods begin and end . . . . .	1104
Initial carrier made liable by statute for default of subsequent carriers . . . . .	1105
Statutory limitation of liability . . . . .	1106
A carrier may limit its liability by contract . . . . .	1107
Carrier's right to stipulate for insurance . . . . .	1108
A carrier may not stipulate for freedom from liability . . . . .	1109
Limitation of the amount for which a carrier shall be liable . . . . .	1110
Liability may be measured at place of shipment . . . . .	1111
Requirement of prompt assertion of claims against carriers . . . . .	1112
Liability of carriers for their passengers' safety . . . . .	1113

## TABLE OF CONTENTS

xvii

[ References are to sections ]

	Section
Telegraph companies.....	1114
Legislation regarding bills of lading.....	1115
Federal legislation on bills of lading.....	1116
The Pomerene Act.....	1117
Kinds of bills of lading which may be issued.....	1118
Carrier's duty to deliver and effect of delivery.....	1119
Cancellation or alterations of bills of lading.....	1120
Lost bills of lading and duplicates.....	1121
Adverse claims to the goods.....	1122
Effect of "shipper's weight, load and count" clause.....	1123
Improper issue of bill of lading by carrier's agent.....	1124
Creditor's rights against goods shipped under an order bill of lading.....	1125
Carrier's lien.....	1126
How bills of lading may be negotiated or transferred.....	1127
Effect of negotiation or transfer.....	1128
Warranties on negotiation or transfer of bill of lading.....	1129
<i>Bona fide</i> purchaser protected in spite of defects in the title of his vendor....	1130
What encumbrances on goods can be asserted against the holder of an order bill of lading; criminal offences.....	1131
Definitions, etc.....	1132
Final sections.....	1133
Additional provisions in state law.....	1134

## CHAPTER XXXIII

### BILLS OF EXCHANGE AND PROMISSORY NOTES

Law governing negotiable instruments.....	1135
The Uniform Negotiable Instruments Law—general rules governing form of instrument.....	1136
Explanation of meaning of requirements stated in the preceding section...	1137
Possible additions or omissions.....	1138
When payable on demand, to order or to bearer.....	1139
Date of negotiable instrument.....	1140
Filling blanks in instruments.....	1141
Delivery.....	1142
Ambiguous instruments.....	1143
Signature.....	1144
Voidable or void signatures.....	1145
Consideration and value.....	1146
Accommodation parties.....	1147
How instruments are negotiated.....	1148
What amounts to an indorsement.....	1149
Partial indorsements invalid.....	1150
Various kinds of indorsement.....	1151
Restrictive and qualified indorsements.....	1152
Other kinds of indorsement.....	1153

[ References are to sections ]

	Section
Time and place of indorsement, etc. . . . .	1154
Transfer of negotiable instrument distinguished from negotiation. . . . .	1155
Reissue. . . . .	1156
Who is a holder in due course. . . . .	1157
Absolute and personal defences. . . . .	1158
To what defences a holder in due course is subject. . . . .	1159
Liability of maker, drawer or acceptor. . . . .	1160
Irregular indorsers. . . . .	1161
Warranties implied on negotiation. . . . .	1162
Liabilities of various indorsers. . . . .	1163
When presentment is necessary. . . . .	1164
Day for presentment. . . . .	1165
General requisites of presentment. . . . .	1166
Presentment in special cases. . . . .	1167
When presentment is executed or delay justified. . . . .	1168
Dishonor and its effect. . . . .	1169
When an instrument matures. . . . .	1170
Date of maturity important for three questions. . . . .	1171
In Europe an instrument is overdue for all purposes at the same time. . . .	1172
When right of action accrues in the United States. . . . .	1173
When an instrument is overdue for other purposes. . . . .	1174
When right of action accrues on demand paper. . . . .	1175
Maturity of demand paper to charge indorsers. . . . .	1176
Domiciled notes. . . . .	1177
Payment. . . . .	1178
Requirement of notice, and its effect. . . . .	1179
Form of notice. . . . .	1180
To whom notice must be given. . . . .	1181
Time allowed for notice. . . . .	1182
Notice properly sent is effective though not received. . . . .	1183
Time for charging successive parties. . . . .	1184
Address to which notice must be sent. . . . .	1185
Effect of waiver. . . . .	1186
Excuses for failure or delay in giving notice. . . . .	1187
Effect of notice of non-acceptance; protest. . . . .	1188
Discharge of instrument. . . . .	1189
Discharge of individual parties. . . . .	1190
Effect of payment by a party secondarily liable. . . . .	1191
Renunciation without consideration. . . . .	1192
Unintentional cancellation and alteration. . . . .	1193
Special rules governing bills of exchange. . . . .	1194
What amounts to an acceptance. . . . .	1195
General and qualified acceptances. . . . .	1196
When presentment for acceptance is necessary. . . . .	1197
How and when presentment for acceptance should be made. . . . .	1198
Dishonor by non-acceptance and its effect. . . . .	1199
Requirement of protest and its contents. . . . .	1200
By whom, when and where protest should be made. . . . .	1201
When protest excused; lost bill. . . . .	1202

## TABLE OF CONTENTS

xix

[ References are to sections ]

	Section
Nature of acceptance for honor.....	1203
Obligation incurred by acceptor for honor.....	1204
Presentment and protest of acceptance for honor.....	1205
Payment for honor.....	1206
Bills in parts or sets.....	1207
Definition of a promissory note.....	1208
Checks.....	1209
Miscellaneous provisions.....	1210

## CHAPTER XXXIV

### CONTRACTS OF SURETYSHIP. THE SURETY'S LIABILITY AND DEFENCES

Suretyship defined.....	1211
Capacity to become surety.....	1212
The principal's non-liability as a defence to the surety.....	1213
The principal's non-liability as a defence to the surety's promise to pay a fixed sum.....	1214
Discharge in bankruptcy of the principal debtor.....	1215
Discharge of the principal in bankruptcy may prevent performance of a con- dition of the surety's liability.....	1216
Illegality of the contract with the principal as a defence to the surety.....	1217
Duress or fraud practiced on the principal.....	1218
Payment of the debt discharges the surety.....	1219
Release of the principal discharges the surety.....	1220
Whether an executory accord with the principal discharges the surety.....	1221
Giving time to the principal discharges the surety.....	1222
Surety's consent to extension of time.....	1223
Agreements with third persons to give time to the principal.....	1224
Reasons for discharge of surety when time has been given to the principal.....	1225
Certainty of time for which extension is promised.....	1226
Extension of time for an illegal or usurious consideration.....	1227
Acceptance by the creditor of a confession of judgment at a future day by the principal.....	1228
A promise to give time supported by an oral counter-promise within the Stat- ute of Frauds.....	1229
Reservation of rights against the surety.....	1230
Delay in enforcing the claim against the principal does not discharge the surety.....	1231
Surrender of security by the creditor discharges the surety <i>pro tanto</i> .....	1232
Impairment of security by creditor's negligent inaction.....	1233
Whether surrender of security of less value than the claim ever totally dis- charges the surety.....	1234
Creditor's refusal of tender by the principal discharges the surety.....	1235
Creditor's failure to sue the principal when requested by a surety.....	1236
A surety is not entitled to notice of the principal's default.....	1237

[ References are to sections ]

	Section
Notice when required must be given within a reasonable time . . . . .	1238
Variation or alteration of the contract between creditor and principal if it varies the surety's contract discharges him . . . . .	1239
Variation of risk by change in the principal's contract . . . . .	1240
A change in the terms of the contract between principal and creditor may discharge the surety though not affecting the terms of his contract . . . .	1241
A variation of the contract between creditor and principal impliedly authorized by the original contract between them will not discharge a surety . .	1242
The creditor's variation in the performance of his contract with the principal may discharge the surety . . . . .	1243
When non-compliance with a condition on which a contract is delivered by a surety relieves him from liability . . . . .	1244
Reasons for charging the surety . . . . .	1245
If the creditor is party to the fraud or has notice of it from the form of the instrument he cannot recover . . . . .	1246
Surety is bound by the principal's filling of blanks though in violation of instructions . . . . .	1247
Fraud or duress of the principal inducing the surety's promise will not excuse him . . . . .	1248
Failure of the creditor to disclose material facts at the time the surety's contract is made . . . . .	1249
Retention of a dishonest employee excuses from further liability a surety for his fidelity . . . . .	1250
The surety's right to set off a claim of the principal against the creditor . .	1251
Termination of surety's liability . . . . .	1252
Surety's right to revoke a continuing guaranty . . . . .	1253
It is immaterial that the surety's obligation has been reduced to judgment . . . . .	1254
Effect of prior judgment in favor of the principal on a subsequent action against the surety . . . . .	1255
Effect of prior judgment against the principal on a subsequent action against the surety . . . . .	1256
Equity will give relief against the surety in case of accident or mistake . . .	1257
Injurious action by the creditor will discharge a surety, though the creditor when the obligation was created was ignorant of the suretyship relation .	1258
At common law a party to a negotiable instrument apparently a principal but in fact a surety will be discharged by the creditor's inequitable conduct if the creditor knows of the true relation of the parties . . . . .	1259
Effect of the Negotiable Instruments Law . . . . .	1260
When accommodation parties on negotiable paper are co-sureties . . . . .	1261
Liability of accommodation indorsers on negotiable instruments is presumably successive . . . . .	1262
Release or inequitable dealing with one co-surety partially discharges others . . . . .	1263

[ References are to sections ]

## CHAPTER XXXV

## SURETIES' RIGHTS AND REMEDIES

	Section
Sureties' equitable rights.....	1264
Subrogation.....	1265
The surety is entitled to be subrogated to securities held by the creditor...	1266
The surety is subrogated to intangible advantages of the creditor.....	1267
Subrogation to rights of the creditor which have been legally destroyed by the surety's payment.....	1268
Subrogation is allowed only when debt is fully paid.....	1269
Surety of a surety is entitled to subrogation.....	1270
A surety is entitled to subrogation against a co-surety.....	1271
Security for several debts.....	1272
Subrogation against a bankrupt principal in favor of a surety for part of a debt.....	1273
The surety's right of reimbursement.....	1274
The surety's right of exoneration.....	1275
The surety's right to compel the creditor to resort first to security, or to the principal debtor.....	1276
Contribution.....	1277
Nature and limits of the right of contribution.....	1278
Contribution where sureties are liable for different amounts., .....	1279
Compensated sureties are entitled to contribution.....	1280
A surety must share with his co-sureties the benefit of security.....	1281
Co-sureties and successive sureties.....	1282
A surety who pays unnecessarily is not entitled to indemnity or contribution.	1283
Measure of surety's recovery.....	1284
The surety is limited to reimbursement.....	1285
When a surety who has paid the debt is denied relief against the principal or co-surety because of a defence of the latter.....	1286
Laches.....	1287

actual intent unless expressed in some way in the writing is ineffective, except when it can be made the basis for reformation of the writing.<sup>81</sup> It is true that it is commonly said that the court in the interpretation of contracts is endeavoring to find the intention of the parties. The natural meaning of this language is that the court is endeavoring to find as a controlling factor what, as has just been seen, may be wholly ineffectual. In contracts of which no memorial is made and no writing required by law, it is doubtless true that where parties have made a bargain which both of them understand in a certain sense, their intent (which at least has been made plain to one another)

<sup>81</sup> Eyre, C. B., in *Gibson v. Minet*, 1 H. Bl. 569, 615: "All latitude of construction must submit to this restriction—namely, that the words may bear the sense which by construction is put upon them." So the court said in *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 107, 144 C. C. A. 403, "To adopt the construction contended for on behalf of the appellant would require giving to the agreement a meaning not expressed by the language used. This is not permissible." See also expressions in *Bank of New Zealand v. Simpson*, [1900] A. C. 182, 189; *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 156 C. C. A. 298; *Miller v. New York L. Ins. Co.*, 179 Ky. 246, 200 S. W. 482; *Old Colony St. Ry. Co. v. Brockton, etc., St. Ry. Co.*, 218 Mass. 84, 105 N. E. 866; *Woburn Nat. Bank v. Woods*, 77 N. H. 172, 89 Atl. 491; *Griffith v. Adair*, 74 W. Va. 646, 82 S. E. 749. In *Strong v. Carver*, 197 Mass. 53, 83 N. E. 328, 14 L. R. A. (N. S.) 274, the court said: "In an action to recover royalties under a contract in writing granting the defendant a license to manufacture and sell 'automatic feed attachments' under a certain patent, which by the plain meaning of its words covers only the manufacture and sale of attachments for which the patent was granted, it cannot be shown by oral evidence that the contract was intended to include

automatic feed attachments which were not within the terms of the patent and were not protected by it." In *Canterberry v. Miller*, 76 Ill. 355, 357, the court said: "These papers, offered in evidence as a contract, do not appear to be an agreement between two or more parties. The one signed by appellant, *Canterberry*, reads that he has bought of *himself* 100 head of hogs, for which he agrees to pay *himself* \$4.50 per hundred. The one executed by Appellee, *Miller*, reads that he has sold to *himself* 100 head of hogs, for which *he* agrees to pay \$4.50 per hundred.

"The language used in these instruments is clear and pointed, no ambiguity exists, and it is clearly expressed as words can do it, that appellant buys of himself, and that appellee sells to himself a certain number of hogs, and we are aware of no rule of construction by which we can hold this to be a contract wherein appellant sells and appellee buys a certain quantity of hogs.

"It is no part of the duty of courts to make contracts for parties, and we are aware of no manner in which these instruments can be held to be a contract between appellant and appellee, unless the court should make a radical alteration in the terms of the two instruments." See also *Benjamin v. McConnell*, 4 Gilm. 536, 46 Am. Dec. 474.

must be sought, however inadequately it may have been expressed. But in contracts of the other class, this is not true, and though courts say they are seeking the intention of the parties, the assertion is even more emphatic that this intention can be found only in the expressions of the parties in the writing. In effect, therefore, it is not the real intent but the intent expressed or apparent in the writing which is sought.<sup>32</sup>

<sup>32</sup>In *Mallan v. May*, 13 M. & W. 511, 517, 518, Pollock, C. B., said: "We must apply the ordinary rules of construction to this instrument; and though, by so doing, we may, in some instances, probably in this, defeat the real intention of the parties, such a course tends to establish a greater degree of certainty in the administration of the law. One of these rules is, that words are to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect; and subject always to the observation, that the meaning of a particular word may be shewn, by parol evidence, to be different in some particular place, trade, or business, from its proper and ordinary acceptation."

"Nor is there any difficulty in carrying this instrument into effect, by understanding the word 'London' in its strict sense; and there is no parol evidence of any understanding of the word in a different sense, in the trade or business to which this contract relates. The statement in the case, that London has a popular or colloquial sense, in which Great Russell street would be understood to be within its limits, is by no means sufficient for the purpose of causing us to put a different construction on that word in this instrument."

In *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Iowa, 83, 159 N. W. 465, 473, the court said: "Section 4617 of the Code provides that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it, but it has been held under this that the statute cannot be invoked to show that a written contract was according to the understanding and intent of the parties to be performed in a way different from that expressed in the contract itself. *Walker v. Manning*, 6 Iowa, 519."

In *Letts-Parker Grocer Co. v. Marshall*, 232 Mass. 504, 122 N. E. 647, the court said of a contract: "Even if the parties may have misapprehended its terms, or it may be obscure, or difficult of satisfactory construction, these are no reasons for setting the contract aside. It can be enforced unless it is wholly unintelligible. . . . 'When a party enters into a written contract, in the absence of fraud or imposition he is conclusively presumed to understand the terms and legal effect of it and to assent to them. *Rice v. Dwight Mfg. Co.*, 2 Cush. 80.'"

In *Zimmermann v. Loft*, 125 N. Y. App. Div. 725, 729, the court said: "If the contract as signed does not clearly express the agreement of the parties, that may be a reason why it should be reformed, but until reformed it is the duty of the court to enforce it according to its terms."

In *Reagan v. Bruff*, 49 Tex. Civ.

**§ 611. An exclusively mutual standard is not applicable.**

Few decisions can be found which countenance the view that where a contract is incorporated in a writing which naturally bears a reasonable meaning, if a local standard is applied, a different meaning can be given to it by the court because, by private convention, or otherwise, the parties understood the contract to mean something different from the natural meaning of their written words at the place where the writing was made between parties of the sort who entered into it. Moreover, the

Appeals, 226, 229, the court said: "The Court will not always construe a contract to mean that which the parties to it meant; but will give it the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit.

If words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and intended them to bear, still their actual meaning is generally held to be their legal meaning." See also *Parkhurst v. Smith*, Willes, 332; *Shove v. Wilson*, 9 C. & F. 355, 365; *McConnel v. Murphy*, L. R. 5 P. C. 203, 219; *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715; *Silva v. Silva*, 32 Cal. App. 115, 162 Pac. 142; *Shuler v. Allam*, 45 Colo. 372, 101 Pac. 350; *West Haven Water Co. v. Redfield*, 58 Conn. 39, 18 Atl. 978; *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247; *Millikin v. Starr*, 79 Ill. App. 443, aff'd 180 Ill. 458, 54 N. E. 328; *Schneider v. Turner*, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164 n.; *Bearss v. Ford*, 108 Ill. 16; *Brenzel v. Kirschner*, 128 Ill. App. 136; *Bobb v. Bancroft*, 13 Kans. 123; *Illinois Central R. Co. v. Vaughn*, 33 Ky. L. Rep. 906, 111 S. W. 707; *Pratt v. McCoy*, 128 La. 570, 615, 54 So. 1012; *Maryland Coal Co. v. Cumberland, etc., R. Co.*, 41

Md. 343, 352; *Smith v. Abington Sav. Bank*, 171 Mass. 178, 50 N. E. 545; *Chase v. Ainsworth*, 135 Mich. 119, 97 N. W. 404; *Cottrell v. Michigan United Traction Co.*, 184 Mich. 221, 150 N. W. 857; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Ellis v. Harrison*, 104 Mo. 270, 279, 16 S. W. 198; *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 62, 84 S. W. 76; *Curtin-Clark Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476; *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481; *Dent v. North American S. S. Co.*, 49 N. Y. 390; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; *Zimmerman v. Loft*, 125 N. Y. App. Div. 725, 110 N. Y. S. 499; *Royal v. Southerland*, 168 N. C. 405, 84 S. E. 708; *Hyland v. Oregon Paving Co.*, 74 Or. 1, 144 Pac. 1160, L. R. A. 1915 C. 823; *City Messenger Co. v. Postal Telegraph Co.*, 74 Or. 433, 145 Pac. 657; *Heirs of Watrous v. McKie*, 54 Tex. 65; *Collier v. Robinson* (Tex. Civ. App.), 129 S. W. 389; *Crawford v. El Paso Land Imp. Co.* (Tex. Civ. App.), 201 S. W. 233; *Clark v. Lillie*, 39 Vt. 495; *Cranes Nest Coal, etc., Co. v. Virginia Iron, etc., Co.*, 105 Va. 785, 54 S. E. 884; *Book v. Thomas*, 61 Wash. 607, 610, 112 Pac. 917; *Smith v. Merrill*, 134 Wis. 227, 233, 114 N. W. 508; *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W. 247, and *supra*, § 607.

many expressions in the cases which assert that the normal meaning will be given to language <sup>33</sup> and which assert that if language is clear and unambiguous, there is no room for construction,<sup>34</sup> though they may go too far for accuracy, at least indicate that the law is not likely to adopt the private meaning of the parties as the ultimate test for the construction of their written contracts. [Certainly where the law requires a contract to be in writing, the requirement must be regarded as demanding a standard which, so far as the ambiguity of language permits will furnish to the court evidence of the transaction in a form not wholly dependent for its meaning on the ideas of the parties to it. A code which is known only to the two parties using it, and is not itself in writing, is a language which does not fulfil such a purpose.] If a memorandum made by a buyer and seller who orally agree to sell, states in conformity with a private convention between them adopted for secrecy, that they agree to buy, such a written memorandum is of little use in preventing fraud or perjury,<sup>35</sup> and it cannot be admitted that such a memorandum would satisfy the requirements of the Statute of Frauds, if regarded as a mere memorandum and not as an agreed memorial of the bargain. If the parties have assented to the writing as a memorial of their bargain, the statute would indeed be satisfied, and an enforceable contract would arise, though its terms would be what the words of the parties naturally meant, not what they by special oral agreement had determined that they should. In any case where the parties have assented to a written record of their bargain, whether the law requires a writing or not, the purpose of the so-called parol evidence rule, or one of its purposes, precludes the parties not only from applying a standard which is based on their individual mental understanding but also one based on their individual oral agreement. [As Judge Holmes says: <sup>36</sup> "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would open too great risks, if evidence were admissible to show that when they said five hundred feet they agreed it

<sup>33</sup> See *supra*, § 608.

<sup>34</sup> See *supra*, § 609.

<sup>35</sup> See 4 Wigmore, Evidence, p. 3481.

<sup>36</sup> *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228.

should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church.”)

It should be added that though a private convention is not competent to change the meaning of five hundred feet to one hundred inches, or the meaning of Bunker Hill Monument to the Old South Church, the local or technical usage, if different from ordinary or normal usage, may be competent to produce this result. The view expressed by Judge Holmes is undoubtedly that generally held.<sup>37</sup> And for the same reason that words

<sup>37</sup> In *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715, 717, the court said: “The Court properly excluded the proposed evidence of the defendant as to what was the agreement or understanding between him and plaintiff with reference to the meaning of the words, ‘to be advertised until sold,’ contained in the written contract of sale—the order executed by defendant. The writing itself, construed with reference to the nature of the transaction and in the light of surrounding circumstances, is the sole evidence of the agreement, and parties cannot be allowed to alter or vary its terms by evidence of a contemporaneous parol agreement or understanding as to the meaning of its language.”

In *Adams v. Turner*, 73 Conn. 38, 45, 46 Atl. 247, offer having been made to prove conversations and acts of the parties to show that they attached a peculiar meaning to the words “new and useful improvements” the court said: “It thus appears that the words ‘new and useful improvements’ in this contract, when read in connection with the rest of it, and without the aid of extrinsic evidence, mean actually existing improvements, and that their meaning in this respect is neither ambiguous nor uncertain. Under such circumstances the evidence extrinsic to the writing, offered to show that the parties attached a different meaning to the words in question than the one

expressed in the writing, was properly excluded.”

The same court in *Falletti v. Carrano*, 92 Conn. 636, 103 Atl. 753, 754, said: “Where an agreement in writing is expressed in technical or incomplete terms, parol evidence is admissible to explain that which taken alone would be unintelligible, when such explanation is not inconsistent with the written terms of the instrument. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings, or the terms be vague and general, or have diverse meanings, as ‘household furniture,’ ‘stock,’ ‘freight,’ ‘factory prices,’ and the like, in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain the meaning in any other respect.”

In the contract in suit in *Cooper v. Cleghorn*, 50 Wis. 1 3, 123, 6 N. W. 491, “plaintiffs agreed to furnish ‘four runs best quality of four-foot old stock French burr millstones, *faced and furrowed*.’ Such stones were actually furnished, but the defendants sought to show by parol that, from conversation with one of the plaintiffs prior to the execution of the contract, they were led to suppose that stones which

cannot be given a meaning peculiar to the parties, a sign which the parties agree upon as meaning something but which is meaningless to others, will not be treated as a written agreement. "An 'indecipherable scrawl' does not constitute a contract. When the parties undertake to put their agreement in writing and express its crucial terms by characters or symbols so illegible that the tribunal established to try the facts cannot determine the signification of that which is on the paper, then no contract in writing has been made." <sup>33</sup>

were 'faced and furrowed' would be in a condition for immediate use—that is to say, would be dressed; whereas it was necessary to expend \$500 in rendering them fit to use. It clearly appeared that the words 'faced and furrowed,' among millers, did not imply that the stones would be dressed and in a condition to use. It is evident that the defendants sought to add to and vary the written contract by showing previous negotiations and understanding of the parties as to the meaning of the words 'faced and furrowed.' This evidence was inadmissible."

Broom's Legal Maxims (8th Eng. ed.), 460, sums up the matter thus: "In some cases indeed it is possible that any construction which the court may adopt may be contrary to the real meaning of the parties; and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction." Cf., however, *Buckbee v. Hohenadel, Jr., Co.*, 224 Fed. 14, 26, 139 C. C. A. 478, where the subject-matter of two contracts was named "Chicago Pickle" in one and "Improved Chicago Pickling" in the other. The court said: "The plaintiff for support of its contention that both were used alike to designate 'Westerfield Chicago Pickle'—an old and well-known variety 'especially desirable for pickling purposes'—introduced (as heretofore) various seedmen who testified that

the names were so used and known in the trade. This testimony was controverted, but, irrespective of such disagreement, we understand the alleged usage to constitute circumstantial evidence only of the meaning of the uncertain terms employed in the writing; that, although uniform usage may have strong probative force in the issue of fact thus raised, other circumstances attending the making are equally admissible to ascertain the mutual intention of the parties "therein." The defendant offered proof that the variety tendered for purchase by him was 'Haskell' seed described with certainty; that he then quoted the 'Westerfield' variety at 85 cents per pound, and the 'Haskell' at 70 cents per pound, as optional for purchase; that the plaintiff selected the 'Haskell' tender accordingly for purchase; that they then adopted, as designation for the seed so purchased, the arbitrary name 'Improved Chicago Pickling,' as theretofore applied by the defendant; that 'the witness knew of no other strain or variety or kind of cucumber seed that was being sold under' such name; and that the name was so 'inserted in the contract by Mr. Hohenadel.' We are of opinion that the testimony thus offered was admissible for submission upon the above-defined issue, and that error is well assigned for its rejection."

<sup>33</sup> *Aradalou v. New York &c. R.*, 225 Mass. 235, 114 N. E. 297, 299.

### § 612. Codes and abbreviations.

It may be suggested that if the code language used by the parties has no meaning either normally or locally a different result should be reached from that appropriate in a case where the words used apparently had a clear significance which the code of the parties contradicted. But even in such a case it seems true at least that the Statute of Frauds would not be satisfied.<sup>39</sup> If the contract was in writing, but not required to be by the Statute of Frauds, whether the parol evidence rule would invalidate it is more open to question.<sup>40</sup>

Frequently in written contracts abbreviations are used which are only intelligible to those engaged in a particular business. Parol evidence is admissible to show the special meaning that such abbreviations had, under the circumstances, surrounding the making of the contract.<sup>41</sup> This is true though the contract is within the Statute of Frauds.<sup>42</sup> Even if an abbreviation was in fact not understood by one party, yet if the abbreviation was in such common use under similar circumstances that either party was justified in assuming knowledge by the other, it would seem that the local meaning of the abbreviation could be shown.<sup>43</sup> (Wigmore strongly argues for the universal rec-

<sup>39</sup> See *supra*, § 576.

<sup>40</sup> In *Carland v. Western Union Telegraph Co.*, 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394, the plaintiff sent a telegram reading "Buy 3 May." He was allowed to testify in an action against the Telegraph Company for failure to deliver the message that the dispatch meant "Buy 3000 bushels of May wheat." The court intimated that the question would have been different had the Statute of Frauds been involved. See also *Western Union Telegraph Co. v. Collins*, 45 Kans. 88, 25 Pac. 187, 10 L. R. A. 515.

<sup>41</sup> *Mouton v. Louisville & N. Railway Co.*, 128 Ala. 537, 29 So. 602 ("K. D. and released"); *Berry v. Kowalsky*, 95 Cal. 134, 27 Pac. 286, 30 Pac. 202, 29 Am. St. Rep. 101 ("S. 87 Wheat"); *Wilson v. Coleman*,

81 Ga. 297, 6 S. E. 693 (C. L. R. P. oats); *Savannah, etc., Ry. Co. v. Collins*, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; *Penn Tobacco Co. v. Leman*, 109 Ga. 428, 34 S. E. 679; *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 22 Atl. 868, 13 L. R. A. 438.

<sup>42</sup> See *supra*, § 576.

<sup>43</sup> It has been held that the meaning of an abbreviation where there is no such justifiable belief in its intelligibility cannot be shown. *Rosenfeld v. Peoria D. & E. Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500. "L. & O. Ex. \$20. R. R. val." was not allowed to be explained as meaning "Leaks and outs excepted \$20 R. R. valuation," without proof that the shipper knew the meaning of the abbreviation. It seems open to argument, however, that one who accepts a contract written in a language which

ognition of a purely mutual standard, and in defending this standard as that which should be applied, he says: <sup>44</sup> "Chief Justice Tindal, in his apprehensions that under any other rule 'no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it,' <sup>45</sup> apparently assumes that under the traditional rule an ideal facility and certainty of interpretation can be had.) No such assumption, however, is necessary in order to lead one to prefer a narrower standard than that of the understanding of the parties themselves. By the narrower standard, a facility and certainty of interpretation is obtained, which though not ideal is so much greater than is obtainable under the view favored by Wigmore as to be more than an adequate compensation for the slight restriction put upon the power to grant and contract according to words defined merely by a mutual standard.

The principle is often expressed in the statement that direct evidence of intention is inadmissible. But the rule is not one of evidence but of substantive law. If actual intention were of legal importance, there is no reason why evidence of the intention should not be admitted. That the rule is one of substantive law and not of evidence is clear from the fact that an admission by both parties to a contract that they meant something different from what the contract states when interpreted according to the standard adopted by the law, is ineffectual to change the meaning of the writing.<sup>46</sup> An admission

he does not understand, whether that language is French or shorthand abbreviations, should inform himself as to the meaning of the language, and will be bound by the proper meaning thereof if there is a proper meaning, if he fails to make the necessary inquiry. In the Indiana decision the court seemed to assume that the abbreviations in question had no meaning in the absence of a mutual understanding between the parties, and further that the abbreviations if interpreted as claimed contradicted clear language in the bill of lading in question.

<sup>44</sup> Wigmore on Evidence, § 2462.

<sup>45</sup> Attorney General v. Shore, 11 Sim. 592, 631.

<sup>46</sup> Therefore a plea setting up a different intent from that which the writing expresses is demurrable. Langley v. Owens, 52 Fla. 302, 42 So. 457. See also cases cited *infra*, § 623, to the effect that the construction put by the acts of the parties themselves upon a contract will not change the construction of it if that is unambiguous. The acts of the parties are an admission of their understanding, and these decisions necessarily hold such an admission relates to an immaterial fact.

is a waiver of proof, and if a fact is of legal importance, it may always be established by waiver of proof. Since in this case the waiver is ineffectual, the inference is plain that the actual intention of the parties is of no legal consequence.

**§ 613. Meaning peculiar to the parties may be given to words if the words appropriately express that meaning.**

If words are used by the parties in a special sense even though this meaning is not fully defined, it may be shown provided the words actually used are appropriate under the local standard to express that sense. "John Smith" in a writing means a particular John Smith whom the parties intended. "Blackacre" means a particular Blackacre. The names used are accurate designations, not simply according to the individual standard but under either the local or normal standard.

The infirmity of language which uses the same symbol for different things, alone creates a difficulty. The user of the symbol may properly say—"this is no special convention of mine, the symbol I use is the normal and proper one to express my meaning, therefore it is the symbol of that meaning."

It is sometimes supposed that this principle is confined to proper names,<sup>47</sup> but this seems erroneous. An "advertising chart" may be both as accurate and as ambiguous a term as "John Smith." A "business card" may similarly mean one of several cards; and there seems no more reason for requiring one who uses the term "business card" when dealing with another who understands what business card he refers to, to define by further description the particular business card he has in mind than to make the same requirement of one who uses the words "John Smith," "Blackacre," or "Peerless."<sup>48</sup>

<sup>47</sup> The Theory of Legal Interpretation by O. W. Holmes, 12 Harv. L. Rev. 417, 418.

<sup>48</sup> In *Stoopes v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85, the defendant contracted for the insertion of his business card in 200 copies of the plaintiff's "advertising chart." On being sued for the agreed price, the defendant offered to prove that the advertising chart meant a chart of cloth

to be publicly posted near Worcester and that no such chart had been made and posted. The evidence was held admissible, Wells, J., saying: "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which set forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the

It is often said that direct evidence of intention is admissible in case of equivocation, and most of the illustrations put in this section would be regarded as illustrations of this principle.

best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used, and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation. The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars 'for inserting business card,' etc. In applying this stipulation, if the defendant had a business card distinctly known and recognized as such, there would be no difficulty in giving effect to the contract. But the identification of that card would involve the whole principle of admitting parol evidence for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared, and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style

had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract. The same conditions render the evidence offered by the defendant competent for similar purposes. The term 'his advertising chart' requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was to be an 'advertising chart.'"

In *Ganson v. Madigan*, 15 Wis. 144, 153-4, the court said: "If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial." Accordingly, in that case, the action of the circuit court in admitting evidence by the defendant of the meaning put upon the words "a good team," in a contract containing a warranty that a certain machine should be capable with one man and a *good team* "of cutting and raking off twelve to twenty acres of grain a day," was sustained. The court

But it should be observed that it is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used. The fact that the parties intended their words to bear a certain meaning, would be immaterial were it not for the fact that the words either normally or locally might properly bear such meaning,<sup>49</sup> and this is the basis of the rule in regard to equivocation.

**§ 614. Technical meaning is sometimes given to language in violation of apparent intention.**

The early lawyers dreamed of "a lawyer's paradise where all words have a fixed precisely ascertained meaning, and where if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer questions without raising his eyes."<sup>50</sup> Though little is left of this dream at the present day, there are some technical words and phrases that have acquired so definite a meaning in the law that it would be difficult to induce a court to give a contrary construction to the words especially in a formal instrument, though from the whole document and from the surrounding circumstances it was highly improbable that the parties attached to the words their technical signification. The

continued: "The word '*team*,' as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six or even more of either kind of beasts. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject-matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances." It was earnestly insisted it meant any team that was necessary to pull the machine, whereas

the proof admitted showed the reference was to a team of two horses only. This case was cited and quoted from with approval in *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 68, 84 S. W. 76. See also *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859, where a particular meaning was given to the word "order."

<sup>49</sup> Thus the mere fact that a note sued on was ambiguous as to the capacity in which defendants signed did not render admissible their testimony as to their undisclosed intentions in signing. *Planters' Chemical & Oil Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

<sup>50</sup> Quoted from Thayer's Preliminary Treatise on Evidence, in 4 Wigmore, Evidence, § 2462.

rule in *Shelley's* case when applied must often have been recognized as violating the natural sense of a deed.<sup>51</sup> So in insurance policies, conditions by repeated construction of the court acquire a definite meaning which it would be difficult if not impossible to overthrow in a particular case, however clearly extrinsic evidence might show that the parties attached another meaning to their words and one which, as an original question, they might reasonably bear. Especially in Marine Insurance policies this is true. Early decisions and customs established the meaning of the forms then in use, and "Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract."<sup>52</sup> It is obvious that this presumption that parties know the technical legal meaning of the language which they use, and thereupon adopt that meaning may often be very artificial;<sup>53</sup> and it is a reasonable expectation and in accordance with the tendencies of the law, that the disposition of courts will be to give language less and less frequently an artificial meaning at variance with the apparent intention of the parties.<sup>54</sup>

<sup>51</sup> See *Broom, Legal Maxims* (8th Eng. ed.), 426 *et seq.*, for this and other cases of artificial meanings given to special words in wills. It must be supposed that the same construction would be given to the same words in settlements *inter vivos* or in contracts to make such settlements or wills.

<sup>52</sup> *Lohre v. Aitchison*, 3 Q. B. D. 558, 562.

<sup>53</sup> See *infra*, §§ 618, 650.

<sup>54</sup> In *Utica City Nat. Bank v. Gunn*, 222 N. Y. 204, 118 N. E. 607, 608, the court said: "The proper legal meaning, however, is not always the meaning of the parties. Surrounding circumstances may stamp upon a contract a popular or looser meaning. . . . To take the primary or strict meaning

is to make the whole transaction futile. To take the secondary or looser meaning is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice." See also *Mill Wood & Coal Co. v. Flint River Cypress Co.*, 16 Ga. App. 636, 85 S. E. 943; *Hill v. Philo*, 155 N. Y. S. 922. The common judicial attitude is shown by the language of the court in *Propper v. Colson*, 86 N. J. Eq. 399, 99 Atl. 385, 386. "The present case does not involve the meaning of words in a conversation between laymen, but of words used in a formal written instrument, the purpose of which is to express the mutual rights and obligations of the parties to it. In construing such in-

### § 615. Adoption of existing law into a contract

It is commonly said that existing laws form part of a contract and are incorporated in it.<sup>55</sup> If this is literally true, the

struments the general rule, subject to few exceptions, is that the words contained therein shall be given their ordinary legal significance." See also *infra*, § 618. In *Wallis v. Pratt*, [1911] A. C. 394 (reversing s. c., [1910] 2 K. B. 1003), one who innocently sold seed which was in fact "giant sainfoin" as "common English sainfoin" was held liable though the contract between buyer and seller provided "the sellers give no warranty expressed or implied as to growth, description or any other matters," on the ground that the seller had made a breach of "condition" though giving no warranty. It may be thought that the court was applying its own technical meaning to "warranty" rather than seeking the natural meaning of their words to the parties. See also *Cotter v. Luckie*, [1918] N. Zeal. L. R. 811.

<sup>55</sup> *Van Hoffman v. Quincy*, 4 Wall. 535, 550, 18 L. Ed. 403; *Rees v. Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72; *Edwards v. Kearzey*, 96 U. S. 595, 601, 24 L. Ed. 793; *Seibert v. Lewis*, 122 U. S. 284, 295, 7 S. Ct. 1190, 30 L. Ed. 1161; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905; *Southern Ry. Co. v. Bouknight*, 70 Fed. 442, 446, 17 C. C. A. 181, 30 L. R. A. 823; *Armour Packing Co. v. United States*, 153 Fed. 1, 19, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400 n.; *Seaboard Air Line R. Co. v. Railroad Commission of Alabama*, 155 Fed. 792, 800; *Martin v. Kennecott Copper Corp.*, 252 Fed. 207; *State v. Tampa Water Works Co.*, 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183; *McCaskill v. Union Naval Stores*, 59 Fla. 571, 52 So. 961; *Lynch v. Baltimore &c. R. Co.*, 240 Ill. 567, 571, 88 N. E. 1034; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Long v. Straus*, 107 Ind. 94, 6 N.

E. 123, 7 N. E. 763, 57 Am. Rep. 87; *Swabey v. Boyers*, 274 Mo. 332, 203 S. W. 204; *Norris v. Tower*, 102 Neb. 434, 167 N. W. 728; *Hutchinson v. Ward*, 114 N. Y. App. Div. 156, 99 N. Y. S. 708, 709; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C. 565; *Hogan v. Utter*, 175 N. C. 332, 95 S. E. 565; *Weight v. Bailey*, 45 Utah, 207, 147 Pac. 899; *Hawes v. Wm. R. Trigg Co.*, 110 Va. 165, 65 S. E. 538. See also *Haugen v. Sundseth*, 106 Minn. 129, 134, 118 N. W. 666; *Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411.

In *Seaboard Air Line Ry. Co. v. Railroad Commission*, 155 Fed. 792, 800, the court said of foreign corporations: "All their contracts, save in the exceptional cases stated, are made subject to the right of the state to expel them at pleasure. As 'the laws which exist at the time and place of the making of the contract, and where it is to be performed, enter into and perform part of it,' their contracts are made subject to the exercise of the right, and their expulsion after coming into the state and making contracts does not, therefore, deprive them of property without due process, or deny them the equal protection of the laws, or impair the obligation of their contracts, at least so far as they are concerned."

In *Hutchinson v. Ward*, 114 N. Y. App. Div. 156, 99 N. Y. S. 708, 709, the court said: "They were New Jersey contracts, and it must be assumed that it was intended by the parties that they should be controlled by the existing laws of that state; not only as to their binding force but as to their manner of enforcement. Existing laws giving rights to parties to a contract or limiting their rights, become a

whole law governing the performance of contracts is reduced to part of the construction of the contract; for on the supposition in question rules of law determining the rights of the parties would not be properly regarded as operating upon them irrespective of their expressed intention; but rather as based upon such intention. To be sure no great difference of result would generally be produced whether rules of law are sought first and it is then said that the parties have contracted to be guided by these rules, or whether some natural standards of interpreting the contract are first applied and then appropriate rules of law imposed upon the contract as thus interpreted. The former method of statement, however, is obviously artificial; and it seems unfortunate as a matter of terminology to put in the form of a fiction matters which may be stated accurately. To assume first that everybody knows the law, and, second, that everybody thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to pile a fiction upon a fiction, and certainly without any necessity, for where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones. The fiction is analogous in its essence to that of the "social contract" and, like that, has a long history. It seems to have originated with Dumoulin, a French jurist of the seventeenth century as a doctrine of the conflict of laws in its application to the contract of marriage,<sup>56</sup> and it is obvious that a reason is furnished for

part of the contract as though specially set forth therein." Citing *Union Natl. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143.

<sup>56</sup> In *Saul v. His Creditors*, 5 Martin (N. S.), 569, 599, it is said: "It is evident, the opinions of the greater number of those who think that on the dissolution of the marriage, the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by

them, is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

'It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion, that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties

the application of the law of the place of the contract where that differs from the law of the forum, if it can be said that the former law is literally part of the contract. This method of reaching a conclusion in favor of the place of the contract is not that usually adopted, but has been in bankruptcy cases. It has been held that a party to a contract made and to be performed in England is not discharged from liability under such contract by discharge in bankruptcy under the law of a foreign country in which he is domiciled,<sup>57</sup> and Lord Esher gives as a reason for this conclusion that "parties are taken to have agreed that the law of such country [i. e. that where the contract was made] shall be the law which is applicable to the contract."<sup>58</sup> The court assumed that the law of France where the defendant was domiciled would hold the debt discharged; yet the law of France, as well as that of England, purports to carry out what the parties agreed. The same kind of question has arisen in the United States, with the further complicating circumstance that the Constitution of the United States forbids the individual States from passing laws impairing the obligation of contracts.

If the reasoning quoted above from Lord Esher is sound it should follow that in the converse case where the contract is made and to be performed in a jurisdiction where the defendant is discharged, the discharge should be a defence though the creditor is a citizen of another State. Such, however, is not the American law.<sup>59</sup>

wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and it appears supported by quotations which he makes from his works. Boullenois, *Traité de personnalité et de réalité des lois*. Obs. 29, pp. 740, 757, 758.

"Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine

now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory."

<sup>57</sup> *Gibbs v. La Société Industrielle*, 25 Q. B. D. 399.

<sup>58</sup> 25 Q. B. D. 399, 405.

<sup>59</sup> In *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 590, 24 N. E. 917, it was held that a Massachusetts discharge in insolvency was no bar to an action on a promissory note made by a Massachusetts debtor in Massachusetts and payable in Massachusetts to a citizen of another State who did not

Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case, should be determined by the same standard of interpretation as is applied to their expressions in other respects. A contract providing for a forfeiture for failing to pay taxes for three months after the taxes "become due and payable" incorporates a statute stating when they are due and payable.<sup>60</sup> A contract evidenced by a written statement that \$1,600 has been "received on deposit" is fairly interpreted as a con-

prove his claim in the insolvency proceedings.

Holmes, J., said at page 590: "There is no dispute that the letter of the discharge and of our statute covers the plaintiff's claim: Pub. Sts. c. 157, §§ 80, 81; and the argument in the favor of giving them effect according to their letter is, that unless the statute is void we are bound to follow it; that the law of the place where the contract is made and is to be performed, which is in force at the time of making and for performing it, enters into the contract so far as to settle everywhere what acts done at that place shall discharge it (*May v. Breed*, 7 Cush. 15); and that a discharge in accordance with that law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way.

"We express no opinion upon the weight of this argument. Although it formerly prevailed with this court (*Scribner v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539), it may be that there is a distinction as to a discharge by legal proceedings. It may be that statutes providing for a discharge by an insolvency court do not enter into the contract in such a sense as to bind the contractee to adopt and submit himself to the jurisdiction as an implied

condition of the promisor's undertaking. It does not follow, because the discharge, if effective, does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things; and apart from this consideration it may be that by sound principle the plaintiff is to be taken to have subjected itself Massachusetts proceedings only to the extent that, that if the Massachusetts courts could acquire jurisdiction over it in the ordinary modes by which jurisdiction of the person is acquired, it would be bound everywhere by a discharge granted here."

In *Pullen v. Hillman*, 84 Me. 129, 24 Atl. 795, 30 Am. St. Rep. 340, it was held that a Maine discharge did not affect a debt contracted within the State between citizens of the State when at the time of the insolvency proceedings the creditor was no longer a citizen of the State.

*Cf.*, however, the statement of Fuller, C. J., in *Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538, 10 Sup. Ct. 269: "State Insolvent Laws are . . . binding upon such persons as were citizens of the State at the time the debt was contracted." Fuller, however, was probably not considering the case of citizens who subsequently left the State, but of those who did not become citizens until after the debt arose.

tract to repay that sum on demand.<sup>61</sup> A contract to "equip completely" a restaurant kitchen, is perhaps properly construed as requiring equipment in conformity with laws prescribing sanitary contrivances for such kitchens.<sup>62</sup> "When a statute is in force giving special force and effect to a particular contract, parties who enter into such a contract are held to assent to the force and effect attributed to it by such statute."<sup>62 a</sup> But "it is a dangerous thing to read too many things into a contract that are not placed in the contract by the parties to it"<sup>63</sup> and this is not infrequently recognized. The obligation imposed by law on one who breaks a contract to convey land, to restore any portion of the price which he has received has been held not to form part of the contract and a different statute of limitations applied from that applicable to breach of contract.<sup>64</sup>

### § 616. Respective functions of the court and the jury.

It is obvious that the meaning of language is a question of fact. The code or standard by which it is sought to test the meaning must be discovered frequently by evidence of the facts and circumstances concerning the making of the contract.

<sup>60</sup> *McCaskill v. Union Naval Stores Co.*, 59 Fla. 571, 52 So. 961.

<sup>61</sup> *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

<sup>62</sup> *Manvell v. Weaver*, 53 Wash. 408, 102 Pac. 36. See also *Long v. Owen*, 21 Idaho, 243, 121 Pac. 99, Ann. Cas. 1913 D. 465. Cf. *Cronin v. Pace*, 82 Conn. 252, 73 Atl. 137.

<sup>62 a</sup> *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185, 188 (a contract of casualty insurance).

<sup>63</sup> *Leiendecker v. Aetna Indemnity Co.*, 52 Wash. 609, 611, 101 Pac. 219. In this case it was contended that sureties on a building contract were discharged by premature payments on account of the price. No time for payment was stated in the contract and it was urged that payment was therefore not due until the work was completed, and that any payment

prior thereto discharged the sureties. The court held otherwise, however, citing, *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88, and *Miller v. Eccles*, 155 Pa. St. 36, 25 Atl. 776. In *Cronin v. Pace*, 82 Conn. 252, 254, 73 Atl. 137, the court said of a building contract and of certain statutory building requirements: "This statute imposes a duty for the owner. A contractor's duty is defined by his contract. The contract in the present case did not provide that the plaintiff should construct the building in conformity with statutory requirements."

<sup>64</sup> *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Duncan v. Gibson*, 17 Utah, 209, 53 Pac. 1044. As to whether a warranty implied in law is part of the contract between buyer and seller, see 30 Harv. L. Rev. 296.

Even though the question concerns merely the normal meaning of a word as found in dictionaries, it is still a question of fact, if the word fact is used in a literal sense. But as Professor Thayer has said: <sup>65</sup>

"The judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue. It is true that this is often disguised by calling them questions of law." The reason for this seems to have been a distrust of the jury's ability to answer questions of fact that call for nice discrimination and an educated mind. The construction of written documents has largely been withdrawn from the jury in this way. The general rule is that construction of a writing is for the court.<sup>66</sup> Where, however, the meaning of a writing is uncertain or ambiguous, and parol evidence is introduced in aid of its interpretation, the question of its meaning should be left to the jury.<sup>67</sup> It is obvious that if the contention

<sup>65</sup> Preliminary Treatise on Evidence, 202.

<sup>66</sup> *Lyle v. Richards*, L. R. 1 H. L. 222, 241; *Hamilton v. Insurance Company*, 136 U. S. 242, 255, 10 S. Ct. 945, 34 L. Ed. 419; *Storm v. Montgomery*, 79 Ark. 172, 85 S. W. 149; *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890; *Zeigler v. Illinois T. & S. Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112; *Lexington & B. S. Ry. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257; *Waldstein v. Dooskin*, 220 Mass. 232, 107 N. E. 927; *Klemik v. Henriksen Jewelry Co.*, 128 Minn. 490, 151 N. W. 203; *Peru Plow & I. Co. v. Johnson*, 86 Neb. 428, 125 N. W. 595; *Grueber Engineering Co. v. Waldron*, 71 N. J. Law, 597, 60 Atl. 386; *Smith v. United Tract, etc., Co.*, 168 N. Y. 597, 61 N. E. 1134; *Marshall v. Sackett & Wilhelms Co.*, 166 N. Y. App. Div. 141, 151 N. Y. S. 1045; *Brown v. Davidson*, 42 Okl. 598, 142 Pac. 387; *Veitch v. Jenkins*, 107 Va. 68, 57 S. E. 574; *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

<sup>67</sup> *Simpson v. Margitson*, 11 Q. B. 23;

*Hutchison v. Bowker*, 5 M. & W. 535; *Goddard v. Foster*, 17 Wallace, 123, 21 L. Ed. 589; *Luse v. Martin*, 215 Fed. 28, 131 C. C. A. 336; *Wilkes v. Stacy*, 113 Ark. 556, 169 S. W. 796; *Holland v. Long*, 57 Ga. 36; *McAvoy v. Long*, 13 Ill. 147; *Smith v. Faulkner*, 12 Gray, 251; *Paine v. Ringold*, 43 Mich. 341, 5 N. W. 421; *Blocher v. Mayer Bros. Co.*, 127 Minn. 241, 149 N. W. 285; *Newberry v. Durand*, 87 Mo. App. 290; *Fruin v. Crystal R. Co.*, 89 Mo. 397, 14 S. W. 557; *Rosenthal v. Ogden*, 50 Neb. 218, 69 N. W. 779; *Philadelphia v. Stewart*, 201 Pa. 526, 51 Atl. 348; *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14; *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404; *Kieburts v. Seattle*, 84 Wash. 196, 146 Pac. 400. In *Morrell v. Frith*, 3 M. & W. 402, Lord Abinger, C. B., said: "One case in which the effect of a written document must be left to a jury is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts, in which peculiar terms and abbreviations are employed." The use of the word "sell" in the memoranda of the initiatory part of a contract, the result

heretofore made is sound that the circumstances surrounding the formation of a contract are always admissible in evidence, a division cannot be drawn between cases where parol evidence is admissible and cases where it is not. The distinction must rather be taken between cases where the surrounding circumstances do not tend to show that the words of the contract had a special local meaning, and cases where such a special local meaning is possible in view of the evidence introduced. The jury's function in the construction of documents then will arise wherever, in view of the surrounding circumstances and usages offered in evidence, the meaning of the writing is not so clear as to preclude doubt by a reasonable man of its meaning. If the meaning after taking the parol evidence, if any, into account, is so clear that no reasonable man could reach more than one conclusion as to the meaning of the writing under the circumstances, the court will properly decide the question of fact for itself as it may any question of fact which is equally clear. Also if such uncertainty or ambiguity as there may be in a writing does not arise from, and cannot be solved by, any special local meaning of the words used, or any usage or surrounding circumstances, the court will deal with the matter itself, as the difficulty of construction must be solved from the writing alone. Even though a contract is oral, if the exact words used by the parties are not in dispute, the court will deal with the matter in the same way as if the contract was written.<sup>68</sup> *A fortiori* if a written contract has been destroyed or lost, the court will construe the meaning of the contract after proof has been given of the destruction or loss of the contents of the writing.<sup>69</sup>

#### § 617. Methods of determining the local meaning of a writing.

The inquiry of a court which has before it a writing demanding interpretation should be then.—What was the meaning of the writing at the time and place it was made between per-

of several conferences and conversations, has been held not conclusive, as matter of law, as to the nature of the contract."

<sup>68</sup> *Morrell v. Frith*, 3 M. & W. 402; *Globe Works v. Wright*, 106 Mass.

207; *Rogers v. Colt*, 21 N. J. L. 704; *Elliott v. Wanamaker*, 155 Pa. 67, 25 Atl. 826.

<sup>69</sup> *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; *Wellman v. Jones*, 124 Ala. 580, 27 So. 416.

sons of the kind or class who were parties to it? The rules laid down to aid the court in this inquiry are all subordinate to this main object. The general intent so far as it is manifested is more important than particular words.<sup>70</sup> "In general, in questions depending on the construction of contracts, cases are of little value; for all agreed that the construction is to be according to the intention appearing by the words: and the words rarely are the same."<sup>71</sup> Rules of interpretation, so far as they have value, are based on the natural and logical processes of determining the meaning of language according to the standard adopted by the law.<sup>72</sup> Such rules may be divided into two classes, primary and secondary. The primary rules are those which are always applicable, whether the writing seems clear or ambiguous. The secondary rules are those which are applicable only where after the primary rules or principles have been applied, the local meaning of the writing is still uncertain or ambiguous. The same rules are applicable to informal parol agreements, but, as has been seen,<sup>73</sup> the standard there sought to be applied is slightly different. Though there are different rules of substantive law as to the effect of sealed and unsealed written contracts, and as to their variation by parol after they have been entered into, the rules of interpreting them at the present day are the same.<sup>74</sup> So courts of law and equity have no different rules for determining the meaning of a contract.<sup>75</sup>

<sup>70</sup> *Erickson v. United States*, 107 Fed. 204; *Field v. Leiter*, 118 Ill. 17, 26, 6 N. E. 877; *Gibbs v. People's Nat. Bank*, 198 Ill. 307, 312, 64 N. E. 1060; *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756; *United Boxboard, etc., Co. v. McEwan Bros. Co.* (N. J. Eq.), 76 Atl. 550, 553; *Bristol v. Bostwick*, 139 Tenn. 304, 202 S. W. 61; *Collins v. Lavelle*, 44 Vt. 230.

<sup>71</sup> *Lord Blackburn in Calcutta, etc., Steam Navigation Co. v. DeMattos*, 32 L. J. (N. S.) 332, 330.

<sup>72</sup> *Hoffman v. Eastern Wisconsin, etc., Light Co.*, 134 Wis. 603, 115 N. W. 383.

<sup>73</sup> See *supra*, § 605.

<sup>74</sup> *Dwy v. Connecticut Co.*, 89 Conn.

74, 92 Atl. 883, L. R. A. 1915 E. 800; *Kane v. Hood*, 13 Pick. 281. In *Robertson v. French*, 4 East, 130, 134, Lord Ellenborough said: "The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance." Cf. *Doe v. Benson*, 4 B. & Ald. 588, where the court held that in a parol lease "Lady Day" might be shown by usage to mean old "Lady Day" not the day then fixed by statute, but approved of an earlier case which held the contrary, because the lease there was by deed and "evidence is not admissible to explain a deed."

<sup>75</sup> *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

### § 618. Primary rules of interpretation.

1. The common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it. Ordinary language may bear locally an extraordinary meaning in some circumstances, but in the vast majority of cases it does not.<sup>76</sup> 2. Technical terms or words of art will be given their technical meaning,<sup>77</sup> unless the context or local usage shows a contrary intention,<sup>78</sup> and under this principle mercantile terms in mercantile contracts will be given the meaning which merchants ordinarily give them.<sup>79</sup> This rule,

<sup>76</sup> "The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." Lord Wensleydale, in *Grey v. Pearson*, 6 H. L. C. 61, quoted by *Ld. Blackburn, Caledonian Ry. v. North British Ry.*, 6 Ap. Cas. 114, 131, and by Swayze, J., in *Thompson v. Trenton Water Power Co.*, 77 N. J. L. 672, 73 Atl. 410; *Fowell v. Tranter*, 3 H. & C. 458, 461, per Bramwell, B.; *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71. See also *Cowles Elec. Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616, 47 U. S. App. 531; *Fitzgerald v. First Nat. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Wege v. Safe-Cabinet Co.*, 249 Fed. 696, 161 C. C. A. 606; *Wolf v. Schwill*, 282 Ill. 189, 118 N. E. 414; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189.

<sup>77</sup> *Taylor v. St. Helen's Corp.*, 6 Ch. D. 264; *Lloyd v. Kehl*, 132 Cal. 107, 64 Pac. 125; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102;

*Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824; *Maryland Coal Co. v. Cumberland, etc., R. Co.*, 41 Md. 343, 352; *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66, 31 So. 536; *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453; *McDonough v. Jolly*, 165 Pa. 542, 30 Atl. 1048, *Frost v. Martin* (Tex. Civ. App.), 203 S. W. 72; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

<sup>78</sup> See cases cited *supra*, §§ 614, 560.

<sup>79</sup> *Robertson v. French*, 4 East, 130; *Mallan v. May*, 13 M. & W. 511, 517; *Holt v. Collyer*, 16 Ch. D. 718; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381 ("Reserve" in a ball player's contract); *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 768; *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296; *Wood v. Allen*, 111 Ia. 97, 82 N. W. 451; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *New England Granite Works v. Bailey*, 69 Vt. 257, 37 Atl. 1043. In *Robertson v. French*, 4 East, 130, 135, Lord Ellenborough said: "It is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the sub-

however, will yield if the application of other primary rules show a contrary meaning. Thus, if the circumstances or context show that a technical word was not used in its proper technical sense, another meaning may be given it.<sup>80</sup> So an ordinary word may from the context (or surrounding circumstances) be given an unusual meaning.<sup>81</sup> 3. The writing will be read as a whole, and every part will be construed with reference to the whole; and if possible it will be so construed as to give effect to its general purpose.<sup>82</sup> The context and subject-matter of a contract may show that in a particular sentence an ordinary word has an unusual meaning;<sup>83</sup> or that

ject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." Quoted by Abbott, C. J. (Lord Tenterden), in *Lang v. Anderson*, 3 B. & C. 495, 500, and in *Hunter v. Leathley*, 10 B. & C. 858, 871.

<sup>80</sup> *Gruenewald v. Neu*, 215 Ill. 132, 74 N. E. 101; *Fisher Electric Co. v. Bath Iron Works*, 116 Mich. 293, 74 N. W. 493; *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio, 385; *Lehigh &c. Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919.

<sup>81</sup> *Simmons v. Groom*, 167 N. C. 271, 83 S. E. 471.

<sup>82</sup> 2 Coke Inst. 173 ("et antecedentibus et consequentibus fit optima interpretatio"); *Coles v. Hulme*, 8 B. & C. 568; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *O'Brien v. Miller*, 168 U. S. 287, 42 L. Ed. 469, 18 Sup. Ct. 140; *Canadian Northern R. Co. v. Northern Miss. R. Co.*, 209 Fed. 758, 126 C. C. A. 482; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Fort Smith Light, etc., Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *McCaskill v.*

*Union Naval Stores Co.*, 59 Fla. 571, 574, 52 So. 961; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Gibbs v. People's Nat. Bank*, 198 Ill. 307, 312, 64 N. E. 1060; *Warrum v. White*, 171 Ind. 574, 86 N. E. 959; *Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136; *Smith v. Davenport*, 34 Me. 520; *McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915 A, 601; *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224; *Webb v. Missouri State L. I. Co.*, 134 Mo. App. 576, 580, 115 S. W. 481; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683; *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686; *First Nat. Bank v. Jones*, 219 N. Y. 312, 114 N. E. 349; *Spencer v. Jones*, 168 N. C. 291, 84 S. E. 261; *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Friedheim v. Walter H. Hildie Co.*, 104 S. Car. 378, 89 S. E. 358; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Toellner v. McGinnis*, 55 Wash. 430, 104 Pac. 641; *Southern Flour, etc., Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

<sup>83</sup> *Brush, etc., Co. v. Montgomery*, 114 Ala. 433, 21 So. 960; *Kohl v.*

a word whose meaning, taken by itself, is clear, has been inaccurately used.<sup>84</sup> “*Noscitur a Sociis*” is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated.<sup>85</sup> 4. The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made;<sup>86</sup> and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract. The importance of this rule and the fact that it is sometimes supposed to be applicable only in the case of an ambiguous writing makes necessary some discussion in a subsequent section as well as some definition of what is meant by surrounding circumstances.

**§ 619. Secondary rules. The main purpose of the instrument will be given effect.**

It not infrequently happens that even after the application of the primary principles which have been considered and obtaining all possible light from surrounding circumstances, usages, the nature of the business, and the object of the bargain, it is still uncertain what the contract legally means. Under these circumstances certain rules are recognized as helpful in arriving at a conclusion.

Frederick, 115 Ia. 517, 88 N. W. 1055; Atkinson v. Sinnott, 67 Miss. 502, 7 So. 289; Simmons v. Groom, 167 N. Car. 271, 83 S. E. 471; Pendleton v. Saunders, 19 Or. 9, 24 Pac. 506; Lehigh, etc., Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; Kentzler v. Accident Assoc., 88 Wis. 589, 60 N. W. 1002.

<sup>84</sup> “There is a distinction between an inaccuracy and an ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous though perfectly accurate. . . . The language may be inaccurate but if the court can determine the meaning of this inaccurate language without any other guide than a knowledge of the simple facts upon which, from the nature of lan-

guage in general, its meaning depends, the language though inaccurate, could not be ambiguous.” Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543, quoting from Riggs v. Myers, 20 Mo. 239.”

<sup>85</sup> Elliott v. Bishop, 10 Exch. 496, 519, 11 Exch. 113; State v. Western Union Tel. Co., 196 Ala. 570, 72 So. 99; Morse v. Fire &c. Ins. Co., 30 Wis. 534, 537, 11 Am. Rep. 587. So in the construction of statutes. State v. Liffing, 61 Ohio St. 39, 50, 55 N. E. 168, 46 L. R. A. 334, 76 Ann. St. Rep. 358; Blake v. Blake, 75 Wis. 339, 43 N. W. 144.

<sup>86</sup> Batchelder v. Batchelder, 220 Mass. 42, 107 N. E. 455. See *infra*, § 629.

1. The court will if possible give effect to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable;<sup>87</sup> and if this is impossible a construction which gives effect to the main apparent purpose of the contract will be favored.<sup>88</sup> Indeed, in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded,<sup>89</sup> or supplied.<sup>90</sup> Thus "or" may be given the meaning of "and," or vice versa, if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it.<sup>91</sup>

<sup>87</sup> *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 60 L. Ed. 1058, 36 S. Ct. 662; *Greil v. Stollenwerck* (Ala.), 78 So. 79; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *New Brantner Extension Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498; *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256; *Sanitary District v. McMahon & Montgomery Co.*, 110 Ill. App. 510; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488, 26 N. W. 762; *Caledonia Coal Co. v. Consolidated Coal Co.*, 181 Mich. 431, 148 N. W. 187; *Home Mut. F. Ins. Co. v. Pittman*, 111 Miss. 420, 71 So. 739; *McGavock v. Omaha Nat. Bank*, 64 Neb. 440, 90 N. W. 230; *Fleischman v. Furgueson*, 223 N. Y. 235, 119 N. E. 400; *Reynolds v. Stockman*, 109 S. Car. 112, 95 S. E. 341; *McKay v. Barnett*, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371; *Burt v. Stringfellow*, 45 Utah, 207, 143 Pac. 234; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189.

<sup>88</sup> *Dimech v. Corlett*, 12 Moo. P. C. 199, 228. In *Marx v. American Malting Co.*, 169 Fed. 582, 584, 95 C. C. A. 80, the court said: "It is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose." . . .

"In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason be sacrificed altogether for the promotion of the general purpose of the agreement."

<sup>89</sup> *Edwards v. Jefferson Standard L. Ins. Co.*, 173 N. Car. 614, 92 S. E. 695; *Withington v. Gypsy Oil Co. (Okl.)*, 172 Pac. 634. Thus in a bond for which the condition provided that a debt should not be paid which was recited in the instrument as an obligation, the word "not" was rejected. *Wilson v. Wilson*, 5 H. L. C. 40.

<sup>90</sup> To carry out the main intention manifested in a writing, "words may be transposed, rejected or supplied, if necessary to make its meaning more clear." *Potthoff v. Safety Armorite Conduit Co.*, 143 N. Y. App. Div. 161, 163, 127 N. Y. S. 994. See also *Parkhurst v. Smith, Willes*, 327, 332; *Pacific Surety Co. v. Toye*, 224 Mass. 98, 112 N. E. 653.

<sup>91</sup> *Dumont v. United States*, 98 U. S. 142, 25 L. Ed. 65; *Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Chicago, B. & Q. R. Co. v. Bartlett*, 120 Ill. 603, 11 N. E. 867; *Decker v. Carr*, 11 N. Y. App. Div. 432, 42 N. Y. S. 243, *affd.* 154 N. Y. 764, 49 N. E. 1096; *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223; *Bettman v. Harness*, 42

Clerical or grammatical errors may be corrected;<sup>92</sup> singular or plural language may be treated as if it were the other;<sup>93</sup> and other illustrations might be given of the same principle.<sup>94</sup> Punctuation will be disregarded if the words of a contract indicate that it has been erroneously inserted or omitted;<sup>95</sup> but it may aid in determining the meaning of doubtful language. The freedom of construction permissible is, however, necessarily limited by the principle that unexpressed intention is of no legal effect. The reason for interpolating, omitting or disregarding specific words is that in the remainder of the writing an intention is expressed which makes it evident that particular words were erroneously used.

Therefore where there is a repugnancy between general clauses and specific ones, the latter will govern;<sup>96</sup> and even if

W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. Cf. with *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 180 Fed. 332, 103 C. C. A. 462; *Bridgers v. Ormond*, 153 N. C. 113, 68 S. E. 973.

<sup>92</sup> *Wood v. Coman*, 56 Ala. 283; *Cox v. Britt*, 22 Ark. 567; *Sprague v. Edwards*, 48 Cal. 239; *Kellogg v. Mix*, 37 Conn. 243; *Atlanta, etc., Railroad Co. v. Spear*, 32 Ga. 550; *Calumet, etc., Canal & Dock Co. v. Russell*, 68 Ill. 426; *Aulick v. Wallace*, 12 Bush, 531; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. 231; *Brookman v. Kurzman*, 94 N. Y. 272; *Hoffman v. Riehl*, 27 Mo. 554; *Tenney v. Lumber Co.*, 43 N. H. 343; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N. E. 866; *Watters v. Bredin*, 70 Pa. 235; *Jenkins v. Jenkins*, 148 Pa. 216, 23 Atl. 985; *Eatherly v. Eatherly*, 1 Coldw. 461, 78 Am. Dec. 495; *Carnagy v. Woodcock*, 2 Munf. 234, 5 Am. Dec. 470; *Liston v. Jenkins*, 2 W. Va. 62.

<sup>93</sup> *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Cowles Electric, etc., Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616,

47 U. S. App. 531; *Leith v. Bush*, 61 Pa. 395.

<sup>94</sup> *Boykin v. Bank of Mobile*, 72 Ala. 262, 47 Am. Rep. 408; *Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209; *Berry v. Kowalsky*, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101; *Richelieu Hotel Co. v. International M. E. Co.*, 140 Ill. 248, 28 N. E. 1044, 33 Am. St. Rep. 234; *Schroeder v. Griggs*, 80 Kans. 357, 102 Pac. 469; *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626.

<sup>95</sup> *Holmes v. Phenix Ins. Co.*, 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308; *Cowles Electric Smelting Co. v. Lowrey*, 79 Fed. 331, 24 Fed. 616; *Allen v. United States Fidelity, etc., Co.*, 269 Ill. 234, 109 N. E. 1035; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *General Accident, etc., Co. v. Louisville Home Tel. Co.*, 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917 D. 952; *Perry v. J. L. Mott Iron Works Co.*, 207 Mass. 501, 93 N. E. 798; *Rice v. Lincoln & N. W. R. Co.*, 88 Neb. 307, 129 N. W. 425.

<sup>96</sup> *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

there is no actual repugnancy if the words of the contract are taken literally, yet when from the whole instrument it appears that the purpose of the parties was solely directed towards the particular matter to which the special clause or words relate the general words will be restrained.<sup>97</sup> Thus the recital of a bond may restrain the literal terms of the condition.<sup>98</sup> It is also an accepted principle that "the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given;"<sup>99</sup> and indeed it has been laid down broadly that general words in any contract relating to a particular subject shall be construed as meaning things of the same kind as the particular matters referred to.<sup>100</sup> But "general words following an enumeration of particular things may include other things not *ejusdem generis*, if such appears to have been the intention of the parties."<sup>1</sup>

<sup>97</sup> *Browning v. Wright*, 2 B. & P. 13; *Hesse v. Stevenson*, 3 B. & P. 565, 574; *Linton v. Allen*, 154 Mass. 432, 438, 28 N. E. 780; *Whalon v. Kauffman*, 19 Johns. 97; *Bricker v. Bricker*, 11 Ohio St. 240. See also *Hollerbach v. United States*, 233 U. S. 165, 58 L. Ed. 898, 34 S. Ct. 553.

<sup>98</sup> *Bell v. Bruen*, 1 How. 169, 183, 11 L. Ed. 89; *Union Pacific Co. v. Artist*, 60 Fed. 365, 19 U. S. App. 612, 23 L. R. A. 581, 9 C. C. A. 14; *Canton Inst. v. Murphy*, 156 Mass. 305, 31 N. E. 285; *Kellogg v. Scott*, 58 N. J. Eq. 344, 44 Atl. 190; *National Mech. Bkg. Assn. v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146. "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." *Ex parte Dawes*, 17 Q. B. D. 275, 286; quoted with approval in *Williams v. Barkley*, 165 N. Y. 48, 57, 58 N. E. 765.

<sup>99</sup> *Directors, etc., of the S. W. Ry.*

*Co. v. Blackmore*, L. R. 4 H. L. 610, 623; *Fire Ins. Assoc. v. Wickham*, 141 U. S. 564, 581, 35 L. Ed. 860, 12 S. Ct. 84; *Lumley v. Wabash Railway Co.*, 76 Md. 66, 22 C. C. A. 60; *French v. Arnett*, 15 Ind. App. 674, 44 N. E. 551; *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, 1 S. W. 350; *McIntyre v. Williamson*, 1 Edw. Ch. 34; *Jeffreys v. Southern Ry. Co.*, 127 N. C. 377, 37 S. E. 515; cp. *Jackson v. Ely*, 57 Ohio St. 450, 49 N. E. 792.

<sup>100</sup> *Agar v. Atheneum Life Assur. Soc.*, 3 C. B. (N. S.) 725; *Hendricks v. Webster*, 159 Fed. 927, 87 C. C. A. 107; *Fisher Electric Co. v. Bath Iron Works*, 116 Mich. 293, 74 N. W. 493; *Meyers v. Wood*, 173 Mo. App. 564, 158 S. W. 909; *New York Metal Ceiling Co. v. New York*, 133 N. Y. App. Div. 110, 117 N. Y. S. 632; *Smith's Est.*, 210 Pa. 604, 60 Atl. 255; *Daly v. Old*, 35 Utah, 74, 99 Pac. 460, 28 L. R. A. (N. S.) 463; *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 539, 91 S. E. 391, 394.

<sup>1</sup> *Lindeke v. Associates' Realty Co.*, 146 Fed. 630, 77 C. C. A. 56; *Shaw v. Pope*, 80 Conn. 206, 209, 67 Atl. 495.

**§ 620. Secondary rules: The instrument will be construed if possible so that it shall be effective and reasonable.**

A construction which makes the contract lawful will be preferred over one which would make it unlawful; <sup>2</sup> a construction which renders the contract valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless; <sup>3</sup> a construction which

In *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481, and in *Hoffman v. Eastern Wisconsin &c. Light Co.*, 134 Wis. 603, 115 N. W. 383, the rule of *ejusdem generis* was not applied to the words "or otherwise."

<sup>2</sup> "It is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Lit. 42 a; *Fussell v. Daniel*, 10 Exch. 581, 597, by Martin, B.; *Mills v. Dunham*, [1891] 1 Ch. 576, 590; *Manning v. Ellicott*, 9 App. D. C. 71; *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940; *United States Fidelity Co. v. Board of Commissioners*, 145 Fed. 144, 76 C. C. A. 114; *Wiggin v. Federal Stock Co.*, 77 Conn. 507, 59 Atl. 607; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 96 Am. St. Rep. 177; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Briody v. De Kimpe*, 91 N. J. L. 206, 102 Atl. 688; *Lorillard v. Clyde*, 86 N. Y. 384; *North Pacific Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890; *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 1034; *McCoy v. Bankers' Trust Co.* (Tex. Civ. App.), 209 S. W. 1138; *Pulp Wood Co. v. Green Bay Paper Co.*, 157 Wis. 604, 147 N. W. 1058.

<sup>3</sup> "All contracts should if possible be construed *ut res magis valeat quam pereat*." Byles, J., in *Shoreditch Ves-*

*try v. Hughes*, 17 C. B. (N. S.) 137, 162; *Broom v. Batchelor*, 1 H. & N. 255; *Columbus Construction Co. v. Crane Co.*, 98 Fed. 946, 40 C. C. A. 35; *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 142 C. C. A. 572; *American Tie & Timber Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246; *Sinclair v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 184; *Berry v. Frisbie*, 120 Ky. 337, 27 Ky. L. Rep. 724, 86 S. W. 558; *North River Ins. Co. v. Dyche*, 163 Ky. 271, 173 S. W. 784; *McEvoy v. Security Fire Ins. Co.*, 110 Md. 275, 73 Atl. 157, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428; *Black v. Batchelder*, 120 Mass. 171; *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72; *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101; *National Bank of Commerce v. Flanagan Mills &c. Co.*, 268 Mo. 547, 188 S. W. 117; *Horton v. Rohlf*, 69 Neb. 95, 95 N. W. 36; *Vickers v. Electrozone Co.*, 67 N. J. L. 665, 52 Atl. 467; *Griffey v. New York Central Ins. Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Rice v. Miner*, 151 N. Y. S. 983, 89 N. Y. Misc. 395; *Johnson v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124; *Pulp Wood Co. v. Green Bay Paper Co.*, 157 Wis. 604, 147 N. W. 1058. Thus a writing which recited that it was an agreement between the parties, which was signed by both parties, and by which one party agreed to sell to the other its make of butter for a certain period at a certain price, is a binding agreement for the sale, although it contains no express prom-

makes the contract fair and reasonable will be preferred to one which leads to harsh or unreasonable results.<sup>4</sup> Therefore, construction of a contract which would lead to a forfeiture will not be favored.<sup>5</sup> For the same reason, a restriction in a deed on the use of property will be construed in favor of the grantee;<sup>6</sup> and when contracts are optional in respect to one party, they are strictly construed in favor of the party bound and against the party that is not bound.<sup>7</sup> But the mere fact that parties have made an improvident bargain will not lead a court to make unnatural implications or artificial constructions.<sup>8</sup>

**§ 621. Secondary rules. Language will be construed most strongly against the party using it.**

Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language

is by the buyer to pay. *Roundy & McMurray Co. v. Nicholson Produce Co.*, 166 Ia. 39, 147 N. W. 305.

<sup>4</sup>*A. Lechen & Sons Co. v. Mayflower, etc.*, Min. Co., 173 Fed. 855, 97 C. C. A. 465; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 609, 57 C. C. A. 635; *Little Cahaba Coal Co. v. Aetna L. Ins. Co.*, 192 Ala. 42, 68 So. 317, Ann. Cas. 1917 D. 863; *Letchworth v. Vaughan*, 77 Ark. 305, 90 S. W. 1001; *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536; *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353; *MacDonald v. Aetna Indemnity Co.*, 90 Conn. 226, 96 Atl. 926; *Harz v. Peterson*, 80 Ill. App. 21; *R. F. Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Blitz v. Union Steamboat Co.*, 51 Mich. 558, 17 N. W. 55; *B. Siegel Co. v. Codd*, 183 Mich. 145, 149 N. W. 1015; *Mercartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N. Y. 272, 118 N. E. 618; *Fleischman v. Furgueson*, 223

N. Y. 235, 119 N. E. 400; *Bingell v. Royal Ins. Co.*, 240 Pa. 412, 87 Atl. 955; *Bank of Old Dominion v. McVeigh*, 32 Gratt. 530; *Allemong v. Augusta Nat. Bank*, 103 Va. 243, 48 S. E. 897.

<sup>5</sup>*Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Dumphy v. Commercial Union Assur. Co.*, 107 Tex. 107, 174 S. W. 814; *Sparkman v. Davenport* (Tex. Civ. App.), 160 S. W. 410; *Adams v. Fidelity Lumber Co.* (Tex. Civ. App.), 201 S. W. 1034; *Pagel v. United States Casualty Co.*, 158 Wis. 278, 148 N. W. 878. In *Hunt v. Held*, 90 Ohio, 280, 107 N. E. 765, it was held that where a right to enforce a restrictive covenant in a conveyance is doubtful, all doubts should be resolved in favor of the free use of the property for lawful purposes by the owner of the fee.

<sup>6</sup>*Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768; *Grubb v. Grubb*, 101 Pa. 11.

<sup>7</sup>*Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260.

<sup>8</sup>*In re P. J. Sullivan Co.*, 247 Fed.

are resolved in favor of the latter;<sup>9</sup> and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be construed in favor of the promisee.<sup>10</sup> This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and the words, therefore, are construed most strongly against it.<sup>11</sup> This has been so held even in case of standard policies the terms of which are fixed by statute;<sup>12</sup> but it seems rather that the reason of the rule ceasing, the rule also should cease in such a case; and this view has been taken by some courts,<sup>13</sup> though doubtless a construction already

139; *Kanaskat Lumber Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15.

<sup>9</sup> Bacon's Maxims, Tracts, 42; Shepard's Touchstone, 87, 88; *Mayer v. Isaac*, 6 M. & W. 605; *Wilson v. Cooper*, 95 Fed. 625; *Marx v. American Malting Co.*, 169 Fed. 582, 95 C. C. A. 80; *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 237 Fed. 89; *Denson v. Caddell (Ala.)*, 77 So. 720; *Allen-West Commission Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041; *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; *Asmussen v. Post Printing Co.*, 26 Colo. App. 416, 143 Pac. 396; *Mueller v. Northwestern University*, 95 Ill. App. 258, affd. 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; *Maney Milling Co. v. Baker-Wignall & Co.*, 186 Ill. App. 390; *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136; *Wier v. American Locomotive Co.*, 215 Mass. 303, 102 N. E. 481; *Wetmore v. Patison*, 45 Mich. 439, 8 N. W. 67; *Ardis v. Grand Rapids &c. R. Co.*, 200 Mich. 400, 167 N. W. 5; *Belch v. Schott*, 171 Mo. App. 357, 157 S. W. 658; *Flory v. Supreme Tribe*, 98 Neb. 160, 152 N. W. 295; *Marshall v. Sackett & Wilhelms Co.*, 166 N. Y. App. Div. 141, 151 N. Y. S. 1045; *Hyland v. Oregon Hassam Pav. Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C. 823, Ann. Cas. 1916

E. 941; *In re Eighth Ave.*, 82 Wash. 398, 144 Pac. 533.

<sup>10</sup> 2 Bl. Comm. 380; Cal. Civ. Code, § 1654; *Byron v. First Nat. Bank*, 75 Or. 296, 146 Pac. 516.

<sup>11</sup> *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 476; *Fowkes v. Manchester & London Association*, 3 B. & S. 917; *Joel v. Law Union & Crown Ins. Co.*, [1908] 2 K. B. 863, 890; *Philadelphia Casualty Co. v. Fechheimer*, 220 Fed. 401, 136 C. C. A. 25; *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 So. 923; *Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, L. R. A. 1915 D. 812; *McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820; *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 967, Ann. Cas. 1916 E. 1126; *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184; *Paskusz v. Philadelphia Casualty Co.*, 213 N. Y. 22, 106 N. E. 749; *Moore v. Aetna Life Ins. Co.*, 75 Or. 47, 146 Pac. 151.

<sup>12</sup> *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, L. R. A. 1915 D. 344, Ann. Cas. 1917 B. 1237, 84 S. E. 274; *Gazzam v. German Union F. Ins. Co.*, 155 N. C. 330, 71 S. E. 434.

<sup>13</sup> *Mick v. Royal Exchange Assur.*, 87 N. J. L. 607, 91 Atl. 102; *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 475, 74 N. E. 421.

established by the courts for certain words before the adoption of a standard policy should be given to the same words in a standard policy.<sup>14</sup>

**§ 622. Secondary rules: Written matter in a contract is given greater effect than printed matter.**

Where part of the contract is in writing and part is in printing, the writing will be given effect if there is repugnancy between the two portions of the instrument.<sup>15</sup> "This rule is applied with greater liberality where it appears that the printed matter is in obscure type or placed where it would not be likely to be seen or where the printed matter was evidently not intended to be incorporated in the contract. In such cases the printed matter has been accorded little influence in changing the clear and explicit language of a contract;"<sup>16</sup> but of course

<sup>14</sup> *Davis v. Insurance Co.*, 115 Mich. 382, 73 N. W. 393.

<sup>15</sup> *Robertson v. French*, 4 East, 130, 136; *Joyce v. Realm Ins. Co.*, L. R. 7 Q. B. 580, 583; *Magee v. Lavell*, L. R. 9 C. P. 107, 113; *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Glynn v. Margetson*, [1893] App. Cas. 351; *Breyman v. Ann Arbor R. Co.*, 85 Fed. 579; *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228; *Augusta Factory v. Mente*, 132 Ga. 503, 64 S. E. 553; *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725; *Urbany v. Carroll*, 176 Iowa, 217, 157 N. W. 852; *Mansfield Machine Works v. Common Council*, 62 Mich. 546, 29 N. W. 105; *Sprague Electric Co. v. Board of Commissioners*, 83 Minn. 262, 86 N. W. 332; *Eager v. Mathewson*, 27 Nev. 220, 74 Pac. 404; *Collins v. Knuth*, 51 N. Y. App. Div. 188, 64 N. Y. S. 549; *Fagan v. Ulrich*, 166 N. Y. App. D. 342, 152 N. Y. S. 37; *Egline v. Holcomb*, 84 Wash. 145, 146 Pac. 391.

In *Baumvoll Manufactur von Scheibler v. Gilchrest*, [1891] 2 Q. B. 310, 317, Charles, J., said: "In construing a charter party, no greater effect can be given to writing than to

print, although a different rule may prevail with reference to policies of insurance. *Alsager v. St. Katherine Docks Co.*, 14 M. & W. 794." This distinction, however, seems unreasonable. The decision was reversed by the Court of Appeal on points not necessarily involving the passage quoted, in [1892] 1 Q. B. 253, and the Court of Appeals was sustained in [1893] A. C. 8. See *Harding v. Cargo of Coal*, 147 Fed. 971, 973.

<sup>16</sup> *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619, 623; citing *Sturtevant Co. v. Fireproof Film Co.*, 216 N. Y. 199, 110 N. E. 440; *Sturm v. Boker*, 150 U. S. 312, 327, 14 S. Ct. 94, 37 L. Ed. 1093; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007. The New York court added: "When the printed matter is not evidently intended to be incorporated in the contract and the understanding of the parties is doubtful, it is to be determined, as similar issues are determined, as a question of fact in the light of the surrounding circum-

if the printed and written matter can by any reasonable construction be reconciled, this will be done.<sup>17</sup>

**§ 623. Secondary rules: An interpretation given by the parties themselves will be favored.**

The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court,<sup>18</sup>

stances. *Sturtevant Co. v. Fireproof Film Co. supra*; *Clark v. Woodruff*, 83 N. Y. 518, 522. In the present case the printed clauses are to the left of the signature of the defendant. They are printed in clear type, under a caption printed in type larger than the other type, which caption plainly reads: 'Conditions on which the above order is given.' The printed clauses are at least as plain and as prominently displayed upon the face of the order as the written matter contained therein. They are not in conflict with that which is written. Under these circumstances they must be deemed to be a part of the order and cannot be eliminated therefrom by the court upon an inference as to the intention of the parties, which is not reflected in the order or in any evidence that was received upon the trial."

<sup>17</sup> *Harding v. Cargo of Coal*, 147 Fed. 971, 973; *Hardie-Tynes Foundry Co. v. Glen Allen Oil Mill*, 84 Miss. 259, 36 So. 262; *Eager v. Mathewson*, 27 Nev. 220, 74 Pac. 404; *Gabbert v. William &c. Oil Co.*, 76 W. Va. 718, 86 S. E. 671.

<sup>18</sup> *Fitzgerald v. First Nat. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Nelson v. Ohio Cultivator Co.*, 188 Fed. 620, 112 C. C. A. 394; *Bunday v. Huntington*, 224 Fed. 847, 140 C. C. A. 415; *Bransford v. Regal Shoe Co.*, 237 Fed. 67, 150 C. C. A. 269; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; *S. R. Watkins Medical Co. v.*

*Williams*, 124 Ark. 90, 187 S. W. 653; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951; *New Brantner Ditch Co. v. Kramer*, 57 Col. 218, 141 Pac. 498, Ann. Cas. 1916 B. 1225; *Reeves v. Daniel*, 143 Ga. 569, 85 S. E. 756; *Geithman v. Eichler*, 265 Ill. 579, 107 N. E. 180; *Windmiller v. People*, 78 Ill. App. 273; *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017; *Indiana Natural Gas Co. v. Stewart*, 45 Ind. App. 554, 559, 90 N. E. 384; *Pratt v. Prouty*, 104 Ia. 419, 73 N. W. 1035, 65 Am. St. Rep. 472; *Nicholl v. Wetmore*, 174 Iowa, 132, 156 N. W. 319; *W. T. Tilden Co. v. Densten Hair Co.*, 216 Mass. 323, 103 N. E. 916; *Klemik v. Henricksen Jewelry Co.*, 128 Minn. 490, 151 N. W. 203; *Williams v. Chicago, etc., Ry. Co.*, 153 Mo. 487, 54 S. W. 689; *St. Louis v. Laclede Gaslight Co.*, 155 Mo. 1, 55 S. W. 1003; *Williams v. Auten*, 68 Neb. 26, 93 N. W. 943; *Wilhoit v. Stevenson*, 96 Neb. 751, 148 N. W. 963; *Van Dyke v. Anderson*, 83 N. J. Eq. 568, 91 Atl. 593; *Jarvie v. Arbuckle*, 163 N. Y. App. Div. 199, 148 N. Y. S. 189; *American Soda Fountain Co. v. Gerrer's Bakery*, 14 Okl. 258, 78 Pac. 115; *Wiebener v. Peoples*, 44 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916 E. 748; *Gillespie v. Iseman*, 210 Pa. 1, 59 Atl. 266; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Tustin v. Philadelphia, etc., Iron Co.*, 250 Pa. 425, 95 Atl. 595; *Hassett v. Cooper*, 20 R. I. 585, 40 Atl. 841; *Phetteplace v. British, etc., Ins. Co.*, 23 R. I. 26, 49 Atl. 33; *Williamson v. Eastern Building & Loan Co.*, 54 S. Car. 582, 32 S. E. 765, 71 Am. St.

and to this end not only the acts<sup>19</sup> but the declarations of the parties<sup>20</sup> may be considered. But if the meaning of the contract is plain, the acts of the parties cannot prove a construction contrary to the plain meaning.<sup>21</sup> Such conduct of the parties, however, may be evidence of a subsequent modification of their contract.<sup>22</sup>

Rep. 822; *Herndon v. Wardlaw*, 100 S. Car. 1, 84 S. E. 112; *State v. Board of Trust*, 129 Tenn. 279, 164 S. W. 1151; *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573; *Lovett v. West Virginia Central Gas Co.*, 73 W. Va. 40, 79 S. E. 1007.

<sup>19</sup> *Lette v. Pacific Mill Co.*, 88 Fed. 957, *affd.* 94 Fed. 968, 36 C. C. A. 587; *Clark v. University of Illinois*, 103 Ill. App. 261; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Baxter Springs v. Baxter Springs L. & P. Co.*, 64 Kans. 591, 68 Pac. 63; *Lewiston &c. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 54 Atl. 750; *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728; *Reynolds v. Boston Rubber Co.*, 160 Mass. 240, 245, 35 N. E. 677; *C. D. Smith Drug Co. v. Saunders*, 70 Mo. App. 221; *Kopper v. Fulton*, 71 Vt. 211, 44 Atl. 92; *Clark v. Lambert*, 55 W. Va. 512, 47 S. E. 312; and see cases in the preceding note.

<sup>20</sup> *Laclede Construction Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76; *Ganson v. Madigan*, 15 Wis. 144, 153, 82 Am. Dec. 659. In *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 482, 43 So. 427, the court said: "If it be true, even in the case of a written contract the terms of which are doubtful or ambiguous, that the construction placed thereon by the parties themselves may be shown and shall govern, as the cited cases hold, with how much more force does this principle apply to oral contracts? The principles of technical nicety cannot be strictly applied in the construc-

tion of these everyday oral contracts made by plain business men in their course of trade and traffic. To do so would frequently result in overthrowing the meaning and understanding of the parties."

<sup>21</sup> *Northeastern R. Co. v. Hastings*, [1900] App. Cas. 260; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Cowles Electric Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616; *Lesamis v. Greenberg*, 225 Fed. 449, 140 C. C. A. 481; *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247; *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263; *Finch v. Theiss*, 267 Ill. 65, 107 N. E. 898; *Western Ry. Equipment Co. v. Missouri Malleable Iron Co.*, 91 Ill. App. 28; *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; *Clarke v. Rogers*, 159 Ky. 762, 169 S. W. 485; *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *Cowles Elec. Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616; *O'Brien v. Peck*, 198 Mass. 50, 84 N. E. 325; *Boeing v. Fordney*, 184 Mich. 153, 150 N. W. 852; *Meissner v. Standard Equipment Co.*, 211 Mo. 112, 133, 109 S. W. 730; *Cincinnati v. Gas Light, etc., Co.*, 53 Ohio St. 278, 41 N. E. 239; *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659; *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl. 166, 133 Am. St. Rep. 877, 24 L. R. A. (N. S.) 1078; *Rea v. Pennsylvania Canal Co.*, 245 Pa. 589, 91 Atl. 1053; *Fass v. South Atlantic L. Ins. Co.*, 105 S. Car. 107, 89 S. E. 558.

<sup>22</sup> *O'Brien v. Peck*, 198 Mass. 50, 84 N. E. 325; *Matgolys v. Mollenick*, 98 N. Y. S. 849.

### § 624. Secondary rules: Conflict between prior and subsequent clauses.

It was early laid down "That, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected."<sup>23</sup> The same doctrine has been held in some modern cases applicable to contracts generally.<sup>24</sup> It is obvious, however, that such a rule is extremely artificial, and can only be accepted as a last resort. In most recent cases where it has been applied the later clause was inconsistent with the general purpose of the contract, and for this reason alone might have been disregarded. If, however, the first clause is general in terms, and the latter is particular,<sup>25</sup> or if the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary.<sup>26</sup> The true rule seems to be as stated in a recent Maine decision:<sup>27</sup>

"When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause."

### § 625. Secondary rules: Guaranties.

A contract binding a surety, it has been held, should if pos-

<sup>23</sup> 2 Bl. Comm. 381.

<sup>24</sup> *Employers' Liability Assur. Corporation v. Morrill*, 143 Fed. 750, 74 C. C. A. 640; *Henne v. Summers*, 16 Cal. App. 67, 71, 116 Pac. 86; *Jones v. Pennsylvania Casualty Co.*, 140 N. C. 262, 52 S. E. 578; *Straus v. Wanamaker*, 175 Pa. 213, 226, 34 Atl. 648; *Smith v. Clinkscales*, 102 S. Car. 227, 85 S. E. 1064; *Dustin v. Interstate &c. Assoc.*, 37 S. Dak. 635, 159 N. W. 395, L. R. A. 1917 B. 319; *Bean v. Aetna Life Ins. Co.*, 111 Tenn. 186, 78 S. W. 104; *Wisconsin, etc., Ins. Co. v. Wilkin*, 95 Wis. 111, 118, 69 N. W. 354, 60 Am. St. Rep. 86.

<sup>25</sup> *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

<sup>26</sup> In *Williams v. Hathaway*, 6 Ch. D. 545, 549, Jessel, M. R., said: "It is said that if you find a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that this is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining; in that case the proviso is perfectly valid. There is no authority against that view."

<sup>27</sup> *Union Water Power Co. v. Lewiston*, 101 Me. 564, 65 Atl. 67.

sible be construed in his favor.<sup>28</sup> But there seems little propriety in such a rule and it is opposed to a number of decisions.<sup>29</sup> Certainly if such a rule exists, it must be confined to cases of sureties for accommodation. A guaranty given for the business advantage of the guarantor, and written by him instead of being construed in his favor indeed comes within the rule so often applied to insurance policies, "that the words of the writer of the contract shall be taken most strongly against him."<sup>30</sup> This has been so held frequently in recent years in regard to the contracts of surety companies.<sup>31</sup> The question whether slight variations of risk shall discharge a surety from liability under his contract is often confused with questions

<sup>28</sup> *Nicholson v. Paget*, 1 C. & M. 48. See also *Mellville v. Hayden*, 3 B. & A. 593; *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218; *Jewel Tea Co. v. Shepard*, 172 Ia. 480, 154 N. W. 755; *Ryan v. Williams*, 29 Kans. 487, 497; *State v. Dayton*, 101 Md. 598, 61 Atl. 624. Numerous other decisions say that the surety's contract should be "strictly" construed.

<sup>29</sup> *Lawrence v. McCalmont*, 2 How. 426, 450, 11 L. Ed. 326; *Weinreich Est. Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667 (under Cal. C. C., § 2837); *Gamble v. Cuneo*, 21 N. Y. App. Div. 413, 47 N. Y. S. 548, affd., 162 N. Y. 634, 57 N. E. 110; *United States Rubber Co. v. Silverstein*, 161 N. Y. S. 369; *Daly v. Old*, 35 Utah, 74, 83, 99 Pac. 460; *Noyes v. Nichols*, 28 Vt. 159, 173.

<sup>30</sup> In *Hargreave v. Smee*, 6 Bing. 244, 248, Tindal, C. J., said: "The words employed are the words of the Defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must

be taken most strongly against him." To the same effect is *Drummond v. Prestman*, 12 Wheat. 515, 6 L. Ed. 712; *United States Rubber Co. v. Silverstein*, 161 N. Y. S. 369.

<sup>31</sup> *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552; *Tebbets v. Mercantile & Co. Co.*, 73 Fed. 95, 38 U. S. App. 431, 19 C. C. A. 281; *Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 130 C. C. A. 364; *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 422, 181 S. W. 279, 1200; *New Haven v. Eastern Paving Brick Co.*, 78 Conn. 689, 702, 63 Atl. 517; *Van Buren County v. American Surety Co.*, 137 Ia. 490, 115 N. W. 24, 126 Am. St. Rep. 290; *Streator Clay Mfg. Co. v. Henning Vineyard Co.*, 176 Ia. 297, 155 N. W. 1001; *Hormel v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, and note; *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358; *Farmers' Bank v. Ogden*, 192 Mo. App. 243, 182 S. W. 501; *Bank of Tarboro v. Fidelity & Co.*, 128 N. C. 366, 38 S. E. 908; *Cowles v. United States Fidelity & Co.*, 32 Wash. 120, 72 Pac. 1032; *United American & Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 904, 40 L. R. A. (N. S.) 661.

of the interpretation of his promise, but should be considered separately.<sup>32</sup>

### § 626. Secondary rules: Contracts affecting a public interest.

Grants of franchises and contracts affecting the public interest are to be construed liberally in favor of the public.<sup>33</sup> It will be observed that this rule is based on a different reason from ordinary rules of interpretation. There is no reason to suppose that the parties in fact intended to favor the public, and when a court so assumes, it does so because it is for the public interest so to assume. If interpretation and construction are to be distinguished, this rule as well as that favoring sureties (if such a rule exists) is a rule of construction.

### § 627. Latent and patent ambiguities.

Lord Bacon divided ambiguities in written instruments into latent and patent ambiguities. Those which are not apparent on the face of the instrument are latent; and, according to Lord Bacon, may be explained by pleading and parol proof. But patent ambiguities, Lord Bacon says, cannot be helped by averment "because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment which is of inferior account in law."<sup>34</sup> This rule has been applied to written contracts.<sup>35</sup> But it is chiefly in regard to wills that the maxim has given trouble. Certainly so far as contracts are concerned, it may be wholly disregarded. It was

<sup>32</sup> See *infra*, §§ 1222 *et seq.*

<sup>33</sup> *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 S. Ct. 243, citing, *Parker v. Great Western R. Co.*, 7 Scott, N. R. 835, 870; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, 14; *Southbridge Canal Co. v. Wheeley* 1, 14; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792; *Blake-more v. Glamorganshire Canal Nav. Co.*, 1 Myl. & K. 154, 165; *Lee v. Milner*, 2 Younge & C. (Exch.), 611, 618; *Ware v. Regents Canal Co.*, 28 L. J. (N. S.) Ch. 153, 157; *Gray v. Liver-*

*pool & B. R. Co.*, 4 Ry. & C. Cas. 235, 240. See also *Washington-Oregon Corp. v. Chehalis*, 202 Fed. 591; *Ex parte Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914 A. 152; *People v. Detroit United R. Co.*, 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582.

<sup>34</sup> Bacon's Maxims, Rule 23.

<sup>35</sup> *Hollier v. Eyre*, 9 C. & F. 1; *Romine v. Hoag* (Mo.), 178 S. W. 147; *Douglas v. Morrisville*, 89 Vt. 393, 95 Atl. 810.



together form one contract.<sup>41</sup> Though this is generally true, it is not always accurate, even though the several writings are part of the same bargain. Where one of the writings is a formal document it cannot be incorporated in an ordinary writing. A note and a mortgage to secure it are not strictly one contract, though doubtless each is to be construed in connection with the other in order to determine its meaning.<sup>42</sup> It seems further that a contemporaneous writing known to the parties may shed light on the construction of a contract without being

655, 659, 57 N. W. 1117. Cf. the statement in *Ingersoll-Rand Co. v. United States F. & G. Co.*, 92 N. J. L. 403, 105 Atl. 236.

"The rule is that unsigned specifications, not contained in the contract nor in terms made a part thereof by the contract itself, but referred to therein and annexed thereto, must be construed therewith. *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39, 50 Atl. 583; *Monmouth Park Ass'n. v. Warren*, 55 N. J. L. 598, 27 Atl. 932; *McGeragle v. Broemel*, 53 N. J. L. 59, 20 Atl. 857.

"But it is also the rule that, where the specifications are referred to for a specific purpose only, they become a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes. *Short v. Van Dyke*, 50 Minn. 286, 52 N. W. 643; *Harvey v. Radkey*, 1 White & W. Civ. Cas. Ct. App. 276; *Noyes v. Butler*, 98 Minn. 448, 108 N. W. 839; *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, 240 U. S. 264, 36 S. Ct. 300, 60 L. Ed. 636; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220; *Cruthers v. Donahoe*, 85 Conn. 629, 84 Atl. 322, Ann. Cas. 1913 C. 221; *Hayes v. Wagner*, 113 Ill. App. 229, aff'd 220 Ill. 256, 77 N. E. 211."

<sup>41</sup> Part only of another writing may be incorporated in a contract. *Guerini Stone Co. v. P. J. Carlin Const. Co.*,

240 U. S. 264, 36 S. Ct. 300, 60 L. Ed. 636.

<sup>42</sup> Even where the whole bargain is in one document, a similar difficulty may arise. In *Biery v. Haines*, 5 Whart. 563, 566, Kennedy, J., said:—"And if it be so, that Lucas Haines originally executed the instrument upon which the plaintiff founds his claim by setting his name and affixing his seal to it; and that John Shaffer and Adam Haines, at the same time, set their names merely thereto, declining to affix their seals: then it may be that Lucas Haines would be liable upon it, as his specialty, to the plaintiff in a separate action brought against him; and that John Shaffer and Adams Haines would be liable upon it as their notes of hand to the plaintiff, either jointly or severally in actions brought against them. In the body of the instrument it is true that the three promise jointly as well as severally, to pay, yet I apprehend that although according to the rules of law it cannot take effect as a joint obligation upon the three, still in order that it may avail, and be a security to the plaintiff, according to the main design of the parties for the payment of the money therein mentioned, rather than be considered altogether inoperative it ought to be regarded as the separate obligation of Lucas Haines, and as the joint and several promissory note of John Shaffer and Adam Haines to pay the money." 2 Bl. Com. 379; Co. Litt. 42, 2 b.

part of the contract.<sup>42</sup> And though the writings in question were neither executed on the same day,<sup>43</sup> nor made by the same parties<sup>44</sup> the later writing may so far pertain to the same transaction as the earlier that its meaning at the time and place that it was made can be understood only by reference to the earlier writing. If the writings do not pertain to the same matter it is certainly true that they are not parts of a single contract;<sup>45</sup> and if not between the same parties, or not known to both of them,<sup>46</sup> they are generally irrelevant to aid in the interpretation of one another; yet it should be observed that the existence of an earlier writing or statements made in such a writing if known to both parties to a later writing, are part of the surrounding circumstances, and however disconnected the transactions may be which gave rise to the two writings, the existence or contents of the earlier may explain the meaning of the later, and if so should be admissible in evidence. How far printing on the top of an invoice or letter heading is to be regarded as part of an offer or contract written below upon a paper has been considered elsewhere.<sup>47</sup> Doubtless if the writing below is repugnant to the printing above, the writing should be given effect rather than the printing; both because in ambiguous contracts the written portion will always be given effect rather than the print, if both cannot be made harmonious,<sup>47a</sup> and also because the position of the printing in the case supposed is such as to make it reasonable to suppose that in case of repugnancy the real meaning of the transaction is expressed by the writing, rather than the printing.<sup>48</sup>

<sup>42</sup> See *Belding v. Vaughan*, 108 Ark. 306, 157 S. W. 400; *Roberts v. Vonnegut*, 58 Ind. App. 142, 104 N. E. 321.

<sup>43</sup> *Chicago, etc., Bank v. Chicago, etc., Trust Co.*, 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138; *Mt. Morris v. Thomas*, 158 N. Y. 450, 53 N. E. 214.

<sup>44</sup> *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723; *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; *Delogny v. Mercer*, 43 La. Ann. 205, 8 So. 903; *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146.

<sup>45</sup> *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892.

<sup>46</sup> *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

<sup>47</sup> *Supra*, § 90.

<sup>47a</sup> See *supra*, § 622.

<sup>48</sup> In *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093, 14 S. Ct. 99, the court held that clear statements in a written contract could not be varied by the terms of a printed billhead on an invoice of goods. A similar decision is *Schenck v. Saunders*, 13 Gray, 37. In *Yorston v. Brown*, 178 Mass. 103, 59

### § 629. Surrounding circumstances may always be shown.

If the local standard is that by which the meaning of a contract is to be decided, it follows that the local meaning of the language of the writing may be proved to establish the correct application of the language to the things described. To do this involves proof of the time and place of the contract, and of any facts then and there existing which may throw light not on the intention of the parties, but on the local meaning of the writing. Therefore to put the court in the same position as the parties the circumstances under which the contract was made should always be admissible so far as they tend to show the local meaning of the language of the contract, whether or not that language is ambiguous if judged by the normal or ordinary meaning of the words; and the prevailing rule permits this.<sup>49</sup> The court

N. E. 654, however, the court held that a printed heading on a blank furnished by the plaintiff to the defendant for use in making out an order for an engraved portrait might be referred to in order to show that the order was given to the plaintiff as the publisher of a specific book, and therefore required the inclusion of the engraving in that book, and was not simply an order for an engraved portrait.

<sup>49</sup> "In the construction of written contracts the court 'is entitled to place itself in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and to judge of the meaning of the words and of the correct application of the language to the things described.' *Nash v. Towne*, 5 Wall. 699, 18 L. Ed. 527." *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762, 763. See also *Oliver v. Baldwin*, 201 Mich. 336, 167 N. W. 910; *Withington v. Gypsy Oil Co. (Okl.)*, 172 Pac. 634. In *Chicago, Rock Island & P. Railway Co. v. Denver & Rio Grande R. Co.*, 143 U. S. 596, 609, 12 S. Ct. 479, 36 L. Ed. 277, the court said: "There can be no doubt whatever of the general proposition that, in the interpreta-

tion of any particular clause of a contract, the court is not only at liberty, but required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." This was cited and applied in *Western Lumber Co. v. Willis*, 160 Fed. 27, 30, 87 C. C. A. 183. In *Nelson v. Ohio Cultivator Co.*, 188 Fed. 620, 623, 112 C. C. A. 394, this court said: "Notwithstanding the apparent meaning of the language of his obligation of October 27th, considering it in the light of the circumstances which surrounded its execution, evidence of which was admissible, . . .

It must be held to mean, on the record submitted, that the security it called for was to be furnished the defendant before it entered upon the manufacture of the machines." In *Lexington & Big Sandy R. Co. v. Moore*, 140 Ky. 514, 517, 131 S. W. 257, the court said: "In aid of what the parties intended it is admissible in the construction of many contracts that are on their face free from ambiguity to consider their situation and the circumstances and conditions sur-

will put itself in the position of the parties.<sup>50</sup> If the normal standard were the test, the rule would properly be as it is still not infrequently stated that only where the language is ambiguous on the face of the writing, can the circumstances under which the contract was made be admitted.<sup>51</sup>

rounding them at the time the contract was entered into,—not for the purpose of modifying or enlarging or curtailing its terms, but to shed light upon the intention of the parties.” And see cases cited *supra*, § 608, *ad fin.*; also *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *Bradley v. Steam Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Alaska Treadwell Gold Min. Co. v. Alaska Gastineau Min. Co.*, 214 Fed. 718, 131 C. C. A. 24; *Jorgensen v. Tuolumne County*, 205 Fed. 612, 123 C. C. A. 628; *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715; *Roach v. McDonald*, 187 Ala. 64, 65 So. 823; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185; *Shaw v. Pope*, 80 Conn. 206, 209, 67 Atl. 495; *Goldfarb v. Cohen*, 92 Conn. 277, 102 Atl. 649; *Schurger v. Moorman*, 20 Idaho, 97, 108, 117 Pac. 122, 36 L. R. A. (N. S.) 313; *Geithman v. Eichler*, 265 Ill. 579, 107 N. E. 180; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Pratt v. Prouty*, 104 Ia. 419, 422, 73 S. W. 1035, 65 Am. St. Rep. 472; *Anse, etc., Oil Co. v. Babb*, 122 La. 415, 425, 47 So. 754; *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762; *Sweat v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; (“Horn chains” were shown by extrinsic facts to mean chains made partly of hoof and partly of horn); *Interior Linseed Co. v. Becker-Moore Paint Co.*, 273 Mo. 433, 202 S. W. 566; *Kenyon Printing & Mfg. Co. v. Barnsley Bros. Cutlery Co.*, 143 Mo. App. 518, 522, 127 S. W. 666; *Mecca Realty Co. v. Kellogg’s Toasted Corn Flakes Co.*, 151 N. Y. S. 750, 166 N. Y. App.

Div. 74; *Simmons v. Groom*, 167 N. C. 271, 83 S. E. 471; *McCulsky v. Klosterman*, 20 Oreg. 108, 25 Pac. 366, 10 L. R. A. 785; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Phetteplace v. British, etc., Ins. Co.*, 23 R. I. 26, 49 Atl. 33; *Cohen v. P. E. Harding Const Co. (R. I.)*, 103 Atl. 702; *Berry v. Marion County Lumber Co.*, 108 S. Car. 108, 93 S. E. 328, Ann. Cas. 1918 E. 877; *Lipscomb v. Fuqua*, 103 Tex. 585, 589, 131 S. W. 1061; *Elswick v. Deskins*, 75 W. Va. 109, 83 S. E. 283.

<sup>50</sup> *Wright v. Vocation Organ Co.*, 148 Fed. 209, 79 C. C. A. 183; *O. H. Jewell Filter Co. v. Kirk*, 200 Ill. 382, 65 N. E. 698; and see cases in the preceding note.

<sup>51</sup> *Carr v. Montefiore*, 5 B. & S. 408, 428. “The contract of insurance, though a mercantile instrument, is to be construed according to the same rules as all other written contracts, namely, the intention of the parties, which is to be gathered from the words of the instrument interpreted together with the surrounding circumstances. If the words of the instrument are clear in themselves the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the Judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract.” (Cf. the English decisions in § 608, *ad fin.*, to the effect that apparently unambiguous language may be shown to bear other than its apparently clear meaning.)

So in Massachusetts it is said: “If there is no ambiguity in the agreement

In regard to some of these statements, it may be guessed that the court in denying the admissibility of evidence of surrounding circumstances to vary the meaning of an apparently clear writing, meant no more than that in the particular case the evidence offered would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate and that therefore it was useless to hear the evidence. On the other hand, in many cases where evidence of surrounding circumstances has been admitted, the language of the contract in question, if given its normal meaning, was in fact ambiguous, so that no necessity arose for the court to decide whether admission of such evidence is dependent upon ambiguity. The correct principle has been well summarized in a recent decision.<sup>52</sup> "All the attendant facts constituting the setting of a contract are admissible, so long as

itself, the answer must be found from the terms of the instrument alone." *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 107, 72 N. E. 345; *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 59, 83 N. E. 328; *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969; *Waldstein v. Dooskin*, 220 Mass. 232, 107 N. E. 927.

In *Zohrlaut v. Mengelberg*, 124 N. W. 247, 252, 144 Wis. 564, the court said: "In answer to the contention of counsel that testimony of the circumstances surrounding and leading up to the making of a written contract are always admissible for the purpose of putting the court in the position of the parties at the time the contract was made, this court has said: 'Not so. Where there is no ambiguity in the contract, either in its literal sense, or when it is applied to the subject thereof, it must speak for itself, entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can

be done without violence to the rules of language or of law.' *Johnson v. Pugh*, 110 Wis. 167, 170, 85 N. W. 641, 642. Parties cannot use terms with a fixed and certain meaning, and then disclaim such meaning." See also *New Brantner Ditch Co. v. Kramer*, 57 Col. 218, 141 Pac. 498; *Jacobs v. Parodi*, 50 Fla. 541, 555, 39 So. 833; *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517; *Indiana Natural Gas Co. v. Stewart*, 45 Ind. App. 554, 559, 90 N. E. 384; *Chanute Brick Co. v. Gas Belt Fuel Co.*, 82 Kans. 752, 109 Pac. 398; *Crawford v. Elliott*, 78 Mo. 497, 500; *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969; *United Boxboard, etc., Co. v. McEwan Bros. Co.* (N. J. Eq.), 76 Atl. 550, 553; *Neal v. Camden Ferry Co.*, 166 N. C. 563, 82 S. E. 878; *Mosier v. Parry*, 60 Oh. St. 388, 54 N. E. 364; *Burton v. Forest Oil Co.*, 204 Pa. 349, 355, 54 Atl. 266; *Daly v. Old*, 35 Utah, 74, 99 Pac. 460; *Burt v. Stringfellow*, 45 Utah, 207, 143 Pac. 234; *McMillan v. Holley*, 145 Wis. 617, 627, 130 N. W. 455.

<sup>52</sup> *Eustis Mining Co. v. Beer*, 239 Fed. 976, 985, by Learned Hand, J.

they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include." Whatever may be the propriety of admitting evidence of extrinsic facts where the meaning of the instrument is apparently clear, there is no question that such evidence is admissible in every jurisdiction where there is no clear apparent meaning.<sup>53</sup> It must be kept in mind, however, that the only purpose for which such evidence is ever admissible in an action on the contract, is to interpret the writing. So far as the evidence tends to show not the meaning of the writing but an intention wholly unexpressed in the writing, it is irrelevant.<sup>54</sup>

### § 630. Previous negotiations.

The only kind of evidence which may be offered under a rule admitting proof of surrounding circumstances which is likely to cause difficulty, is that relating to previous negotiations between the parties, especially if these negotiations lead to the formation of the subsequent written contract in question. There is an apparent inconsistency in asserting that the interpretation of the writing depends on the meaning of the language contained in it according to a local standard, and yet admitting evidence which may tend to show an intent of the parties at variance with the natural meaning of the words of the writing at the time and place when the writing was made. Such negotiations, however, may be logically relevant for two purposes, the second of which is legally permissible, though the first is not:—(1) to prove an actual intent of the

<sup>53</sup> See cases in this section *passim*, also *Quarry Co. v. Clements*,

38 Ohio St. 587, 43 Am. Rep. 442.

<sup>54</sup> See *supra*, § 610.

parties at variance with the words of the writing when those words are given their appropriate local meaning; and, (2) to prove the meaning of the written words not by showing that the parties intended them to mean something different from what other persons at the same time and place, and dealing with the same subject-matter would attach to them, but to prove that the parties were dealing in regard to a matter or to secure an object, or under circumstances where local usage would give a particular meaning to the language; or in case the local meaning is ambiguous, to show that the parties attached one appropriate meaning to their words, rather than another equally appropriate meaning.<sup>55</sup> If the parties were dealing in regard to rabbits, and locally at that time when rabbits were in question, 1,000 bore the meaning of 1,200, it could be shown

<sup>55</sup> *Birch v. Depeyster*, 1 Stark. 210. (By his contract a ship captain was to receive certain pay instead of "privilege and primage." Evidence was held admissible of a conversation before the writing was made relating to the right of the captain to use the cabin for transporting goods. This evidence explained the meaning otherwise doubtful of the quoted words); *Macdonald v. Longbottom*, 1 El. & El. 977 (prior conversation between the parties was admitted to prove that the words "your wool" included not only wool from the plaintiff's own sheep, but also wool that the plaintiff had contracted for); *Mumford v. Gething*, 7 C. B. (N. S.) 305. (The word "ground" was proved to mean the midland district in order to determine whether the contract in question was in restraint of trade); *Bank of New Zealand v. Simpson*, [1900] A. C. 182. (oral preliminary negotiations admitted to show the meaning of "total cost"); *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361. ("Dollars" was proved to mean confederate money by proof of contemporaneous agreement); *Kelly v. Fejervary*, 111 Ia. 693, 83 N. W. 791 (negotiations were

admitted to prove whether "liquidated damages" provided for were in reality a penalty); *Blair v. Corby*, 37 Mo. 313 (the meaning to the parties of "hard-pan" was shown by oral agreement not to include hardened earth); *Almgren v. Dutilh*, 5 N. Y. 28 (conversation was permitted to prove that "necessary" in a contract did not mean indispensable). See also *Merriam v. United States*, 107 U. S. 437, 27 L. Ed. 531, 2 S. Ct. 536; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *Millikin v. Starr*, 79 Ill. App. 443, 448; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Sweat v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 200, 80 N. E. 527, 9 L. R. A. (N. S.) 966, 120 Am. St. Rep. 539; *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426, 430, 90 N. E. 983; *Tufts v. Greenewald*, 66 Miss. 360, 6 So. 156; *Field v. Munson*, 47 N. Y. 221; *Quarry v. Clements*, 38 Ohio St. 587, 43 Am. Rep. 442; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Hart v. Hammett*, 18 Vt. 127; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Beason v. Kurz*, 66 Wis. 448, 29 N. W. 230.

to explain a written contract which did not name the kind of animals to which it related that the oral negotiation of the parties related to rabbits, though it could not be shown, had they been dealing in regard to horses, that they specially agreed that as between themselves 1,000 should bear the meaning of 1,200. The importance of facts existing at the time when the written contract was entered into, as an aid to the interpretation of the writing, will generally be dependent on the knowledge by the parties of these facts. This may be shown by their previous negotiations;<sup>56</sup> though if the facts are of general notoriety the parties' knowledge of them will be presumed.<sup>57</sup> If, then, facts known to the parties to the agreement may be shown, it may be urged that not only are the negotiations and agreements between the parties prior to the formation of the written contract in question facts like any others but that their intentions orally manifested as to the meaning of their contract are also facts and may therefore be shown. It is true that even such intentions are facts within

<sup>56</sup> In *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 200, 80 N. E. 527, 9 L. R. A. (N. S.) 966, 120 Am. St. Rep. 539, the court said: "When the parties by the language they have employed leave their meaning obscure and uncertain when applied to the subject-matter, then the expressions and general tenor of speech used in the previous negotiations, even if coming as they usually must from one or the other of the parties themselves, are admissible to show the conditions existing at the time the transaction was under consideration."

In *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76, the court said: "Now, the words, 'the ties you may need' during 1899, or 'ties as needed,' while plain words, are susceptible of various meanings according as the context in which they appear may throw light upon them or the subject-matter with respect to which they are used. We instinctively ask, 'needed' for what? Merely for

repairs of the railway then constructed, or 'needed' for new extensions which were made known to defendant when it contracted to furnish them, or 'needed' in the sense of all ties to the number of one million that the plaintiff might elect to purchase for *general commercial purposes*? We think clearly it was competent to show the circumstances in which the contract was made and the declaration of plaintiff's president as to the purpose for which he would need them.

In *Ward's Adm'r v. Preferred Accident Ins. Co.*, 80 Vt. 321, 67 Atl. 821, 822, the court said: "In the construction of contracts, the circumstances in which the parties contract may be looked at, and their common knowledge and understanding is sometimes, and is here, such a circumstance."

<sup>57</sup> *Anse La Butte Oil, etc., Co. v. Babb*, 122 La. 415, 425, 47 So. 745; *Woodruff v. Woodruff*, 52 N. Y. 53; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240.



inadmissible subject to three exceptions—(1) If reformation or rescission of the writing is in question. (2) If the words of the writing will express equally well the intention shown by the oral negotiations, and another intention. The negotiations may then be used to show the actual intention of the parties not to subject them to a contract not expressed in the writing, but to show that the words of the writing bear a particular meaning.<sup>59</sup> (3) Where the writing is not a complete integration of the parties' agreement, and the oral agreement is intended to retain an independent collateral existence. The limits of this principle are hereafter considered.

### § 631. Parol evidence rule.

The interpretation or construction of writings cannot be fully discussed without reference to the parol evidence rule. That rule, in spite of its name, is not only not a rule of evidence, as has been abundantly shown by Thayer and Wigmore, but is not a rule of interpretation or of construction. It is a rule of substantive law which, when applicable, defines the limits of a contract. It fixes the subject-matter for interpretation, though not itself a rule of interpretation.<sup>60</sup> Except in suits for the rescission or reformation of contracts, or where a suit for specific performance is resisted on the ground of mistake, the rule is as fully applicable to suits in equity as to actions at law.<sup>61</sup>

820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

<sup>59</sup> See *supra*, § 613.

<sup>60</sup> *Goldenberg v. Tagliano*, 218 Mass. 357, 359, 105 N. E. 883; *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490. A contract, said Pollock, C. B., in *Nichol v. Godts*, 10 Exch. 191, 194, "must be read according to what is written by the parties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it.

If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear anything." See also *Bank of Australasia v. Palmer*, [1897] A. C. 540, 545.

<sup>61</sup> *Martin v. Pycroft*, 2 DeG. M. & G. 785, 795; *Sawyer v. Hovey*, 3 Allen, 331, 333, 81 Am. Dec. 659; *Ferry v. Stephens*, 66 N. Y. 321, 324. In *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 101 Atl. 151, 161, the court said: "This action [a bill in equity to settle boundaries] does not involve the reformation of any instrument of conveyance given by Mead; and it can serve no good purpose to conje-

Most commonly the rule is invoked when suit is brought upon the written contract in order to preclude an attack upon the terms of the writing as the complete statement of the contract, but the rule also denies validity to a subsidiary agreement within its scope if sued on as a separate contract, although except for the parol evidence rule, the agreement fulfils all the requisites of a valid contract.<sup>62</sup>

In a discussion of the parol evidence rule a distinction should be observed between

1. Contracts under seal;
2. Contracts required by law to be in writing;
3. Contracts which are in fact in writing but not under seal, or required by law to be written.

It was a rule long established of the English law and accepted in the United States that a contract under seal could not subsequently be varied either by oral agreement or by written unsealed agreement. This rule persisted until recently, and to some degree still persists in some jurisdictions.<sup>63</sup> Moreover, a rule, relics of which still remain, estopped the maker of a deed to deny the truth of its recitals.<sup>64</sup> In many jurisdictions even to-day, a conveyance must be under seal, and so must releases or promises made without consideration. The effect of parol promises upon such instruments may be governed by the circumstance that they are under seal, not merely in writing.

ture why, in making the description of the land in the bonds and in the deeds given pursuant to the bonds, the survey and the plan made by Brown were not followed. The departure therefore in each instance is so material and so marked as to indicate a change of purpose. The descriptions adopted show unusual care and precision in their framing. Whatever may have been previously done or said by the parties to the transactions, relative to that survey and plan, such acts and declarations were merged in the written instruments subsequently executed on the one hand and accepted on the other; and neither the survey nor the plan can have any force in this

case, beyond what bearing it may have, if any, by reason of its subsequent use by the parties in connection with the asserted recognition of, or acquiescence in, the line now claimed by defendants. Extrinsic evidence is not admissible to show that, by mistake, one tract of land instead of another was inserted in either of those deeds, thereby really establishing a different contract. *McDuffie v. Magoon*, 26 Vt. 518; *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114."

<sup>62</sup> See, *e. g.*, *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829, and cases cited *infra*, § 643.

<sup>63</sup> See *infra*, § 1849.

<sup>64</sup> See *supra*, § 115a, *infra*, § 647.

Where the Statute of Frauds requires a contract to be in writing the whole contract must be in writing, and oral changes or additions either contemporaneous or subsequent are necessarily invalid apart from the parol evidence rule.<sup>65</sup>

The application to unsealed contracts of a prohibition of contemporary oral agreements seems to have been first made owing to a mistaken analogy with sealed instruments.<sup>66</sup> But the analogy of sealed instruments has not been completely followed and it is important to observe that the reasons which forbid the addition of oral extensions to formal contracts and to contracts within the Statute of Frauds are not applicable to other written contracts. In dealing with the latter we have to do only with the parol evidence rule itself, while in dealing with the former we have not only that rule to consider, but other principles as well.

### § 632. Scope of the rule.

Wigmore in his keen analysis of the subject conceives of the so-called parol evidence rule as in reality a group of rules defining the constitution of legal acts, and he divides every legal act into four possible elements:

“(A), The Enaction, or Creation, of the act; (B), its Integration, or embodiment in a single memorial, when desired; (C), its Solemnization, or fulfilment of the prescribed forms, if any; and (D), the Interpretation, or application of the act to the external objects affected by it.”<sup>67</sup> The enaction or creation of the act is concerned with the question whether an act has been created and, if so, whether it is voidable. For instance, whether a formal contract has been delivered or whether a contract is voidable for fraud. The integration of the act consists in embodying it in a single memorial as a writing. The solemnization concerns the forms which the law requires, as signature of a memorandum under the Statute of Frauds—seals on bonds or deeds, certain requisites in negotiable paper.

<sup>65</sup> See *supra*, §§ 592 *et seq.*

<sup>66</sup> *Meres v. Ansell*, 3 Wils. 275. See comment of Thayer, in Preliminary Treatise on Evidence, p. 402.

<sup>67</sup> Wigmore on Evidence, § 2401. It

should be observed that (A), (B) and (C) may all take place simultaneously. There may be no legal act until (B) and (C) have occurred.

The interpretation defines the effect of the act in its application to external objects. These various problems are doubtless closely connected with the parol evidence rule, and in particular cases there is often confusion in distinguishing one principle from another. Nevertheless what is known as the parol evidence rule is but a single rule. As applied to contracts, it assumes that there has been a legal act consisting of a promise or set of promises; it also assumes the integration of that act in a written memorial. It assumes the proper interpretation of a written memorial according to some standard which the law adopts; and these assumptions being made, excludes from consideration all other elements of the act though they might have been material had there been no integration in a written memorial. In other words, the written memorial, as interpreted by the law, is, for legal purposes, the sole act of the parties in regard to the matter up to the time of the integration. In speaking of the rule, Wigmore says:—<sup>68</sup>

“(1) The parol-evidence rule is not a rule of evidence;<sup>68a</sup> (2) nor is it only a rule for things parol; (3) nor is it a single rule; (4) nor is it all of the rules that concern either parol or writing; (5) nor does it involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.”

All of these statements seem true except the third, that the rule is not a single rule. (All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject-matter are excluded from consideration whether they were oral or written. All courts agree also that subsequent agreements may be shown, and are not rendered ineffective by the prior writing.<sup>69</sup> All courts agree that the written memorial must be interpreted according to legal rules, and that when so interpreted meanings may sometimes be given to it which would not have been apparent without parol evidence. The difference of decision concerns this question:—When is an extrinsic

<sup>68</sup> Wigmore on Evidence, § 2401.

<sup>68a</sup> Upon this, see Thayer, Preliminary Treatise on Evidence, 390 *et seq.*

<sup>69</sup> If the prior writing was under seal,

the subsequent act may be ineffectual.

See *infra*, § 1849, but this depends on the rules governing sealed instruments, not on the parol evidence rule.

agreement or term of an agreement which existed prior to the integration, or was made simultaneously with it, so far a separate and distinct matter as to be capable of existence as an independent legal act? and how far, on the other hand, must it be disregarded as a futile attempt to change the effect of the legal act integrated in the written memorial?) The parol evidence rule does not forbid the contradiction of an instrument which purports merely to recite facts—like a receipt.<sup>70</sup> How far recitals of fact in a deed may be contradicted has been previously considered.<sup>71</sup>

### § 633. Integration depends upon intent.

The parol evidence rule does not apply to every contract of which there is written evidence, but “only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.”<sup>72</sup> It is not essential to integration that the writings in question should be of a formal character. Letters and telegrams are sufficient.<sup>73</sup> Acceptance of a written contract as such is sufficient though it is not signed by the party accepting it.<sup>74</sup> On the other hand,

<sup>70</sup> “A receipt in full of all claims and demands, given as evidence of such settlement, does not conclude the parties as to a claim which affirmatively appears not to have been included in the settlement negotiations.” *Held v. Keller*, 135 Minn. 192, 160 N. W. 487, 490, citing: 1 Durnell’s Dig. 44; *Matheney v. Eldorado*, 82 Kans. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980; *Harrison v. Henderson*, 67 Kans. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386. See also *Hudson v. Merchants Reserve L. Ins. Co.*, 204 Ill. App. 308; *American Home L. Ins. Co. v. Citizens’ State Bank (Okl.)*, 168 Pac. 437; *Jones v. Campbell*, (Vt. 1917), 102 Atl. 102; *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130.

<sup>71</sup> *Supra*, § 115a.

<sup>72</sup> *Pollock, C. B.*, *Harris v. Rickett*, 4 H. & N. 1. See also *Eustis Mining*

*Co. v. Beer*, 239 Fed. 976, 982; *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736; *Hills v. Hopp*, 201 Ill. App. 554; *Bice v. Siver*, 170 Ia. 255, 152 N. W. 498; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819; *Herring-Hall-Marvin Safe Co. v. Balliet*, 38 Nev. 164, 145 Pac. 941; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *H. Leonard Simmons Co. v. Goldfarb*, 150 N. Y. S. 547; *Faust v. Rohr*, 167 N. C. 360, 83 S. E. 622; *City Messenger Co. v. Postal Telegraph Co.*, 74 Ore. 433, 145 Pac. 657.

<sup>73</sup> *Calcutta, etc., Co. v. DeMattos*, 32 L. J. (N. S.) Q. B. 322; *Brown v. Davidson*, 42 Okl. 598, 142 Pac. 387.

<sup>74</sup> *Manufacturers’, etc., Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847. See also *supra*, § 90.

where it is contemplated that there shall be a later writing integrating the agreement of the parties, the contents of an earlier writing may be contradicted by parol.<sup>76</sup> Since it is only the intention of the parties to adopt a writing as a memorial which makes that writing an integration of the contract, and makes the parol evidence rule applicable, any expression of their intention in the writing in regard to the matter will be given effect. If they provide in terms that the writing shall be a complete integration of their agreement or that it shall be but a partial integration, or no integration at all, the expressed intention will be effectuated.<sup>76</sup> The parties, however, rarely express their intention upon this point in the writing, and if the court may seek this intention from extrinsic circumstances, the very fact that parties made a contemporaneous oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made. Even if the oral agreement is repugnant to the writing, what was orally agreed would be of equal importance with what was written, since its existence would prove that there was no complete integration of the contract in regard to the matter to which it related. The parol evidence rule would then be of importance only as establishing a presumption that prior and contemporaneous oral agreements and negotiations were merged in the writing, but the practical value of the rule would be much impaired if either party to a writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this. The question arises chiefly where it is asserted not that there is no integration at all, but only a partial integration. It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms.<sup>77</sup> Frequently, it is not a necessary inference

<sup>76</sup> *Brautigam v. Dean*, 86 N. J. 676, 89 Atl. 760.

<sup>76</sup> *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048.

<sup>77</sup> *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 35 L. Ed. 837, 12 S. Ct. 46; *Dennis v. Slyfield*, 117 Fed.

474, 54 C. C. A. 520; *Telluride Power Co. v. Crane Co.*, 208 Ill. 218, 226, 70 N. E. 319; *Pierce v. Woodward*, 6 Pick. 206; *Ogooshevitz v. Arnold*, 197 Mich. 203, 212, 163 N. W. 846, 165 N. W. 633; *Naumberg v. Young*, 44 N. J. L. 331, 341; *Thomas v. Scutt*, 127

from the writing itself either that it is a statement of the whole agreement, or that it is not. In such a case it has been held that parol evidence is admissible to show which is the fact.<sup>78</sup> The difficulty with such a principle lies in its application. No written contract which does not in terms state that it contains the whole agreement (and few do so provide though it would be generally a wise provision) precludes the possible supposition of additional parol clauses, not inconsistent with the writing. The matter has been well summed up by Finch, J.:<sup>79</sup> "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation <sup>80</sup> it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract."

**§ 634. It may be shown that the writing has never become effective.**

The parol evidence rule does not become applicable unless the parties have assented to a certain writing or writings as the statement of a contract between them. Accordingly it not only may be shown by parol evidence that a writing was

N. Y. 133, 27 N. E. 961; *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514; *Van Doren &c. Co. v. Guardian Casualty &c. Co.*, 99 Wash. 68, 168 Pac. 1124; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620.

<sup>78</sup> *Malpas v. London & S. W. Ry. Co.*, L. R. 1 C. P. 336; *Peabody v. Bement*, 79 Mich. 47, 44 N. W. 416; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048. See also

*Brennecke v. Heald*, 107 Ia. 376, 77 N. W. 1063.

<sup>79</sup> *Eighmie v. Taylor*, 98 N. Y. 288, 294.

<sup>80</sup> The ordinary principles of interpretation should be applied and therefore evidence of surrounding circumstances admitted. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.







intent in giving the transaction the appearance of an absolute transfer, he will be denied relief.<sup>98</sup>

The purpose of an absolute transfer of chattels by bill of sale may likewise be shown to have been merely for security;<sup>99</sup> and the rule is the same where negotiable paper is transferred.<sup>1</sup> Two reasons may be given for this apparent exception to the parol evidence rule, the first of which is that doubtless equity regards the enforcement of the transfer according to its terms as so oppressive as to require the same redress as if the grantee had been fraudulent. From this point of view the cases properly fall within the general class which includes written transactions voidable for fraud, illegality and the like. A second reason is that the mortgagee's agreement to release the security on payment of his debt is in its nature collateral to the transfer of the security, and therefore need not form part of the written transfer.<sup>2</sup> It may be thought that these decisions which allow an absolute written transfer to be shown by parol to have been a mortgage, are inconsistent with decisions which deny the promisor on negotiable paper, or under a non-negotiable written contract the right to prove a condition subsequent to his liability;<sup>3</sup> but the line of distinction is between a transfer of property and the giving of a promise.<sup>4</sup> Aside from historical and technical reasons of equitable jurisdiction, which embraced conveyances of land, but was not concerned with the enforcement of negotiable paper, the theoretical propriety of such a distinction must rest on the assumption that A may very likely give an actual conveyance of Blackacre in absolute form when it is agreed that the transfer shall operate merely as a security,

<sup>98</sup> *Baldwin v. Cawthorne*, 19 Ves. Jr. 166. See also generally on the inability of a grantor to set aside a conveyance made on a secret parol trust with intent to defeat creditors, *Kirby v. Raynes*, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; *Castellow v. Brown*, 119 Ga. 461, 46 S. E. 632; *Jayne v. Jayne*, 148 Ky. 613, 147 S. W. 41; *Redmond v. Hayes*, 116 Minn. 403, 133 N. W. 1016; *Parker v. Parker*, 4 Neb. Unof. 692, 96 N. W. 208; *Conner v. Carpenter*, 28 Vt. 237.

<sup>99</sup> *Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347; *Parks v. Hall*, 2 Pick. 206; *Booth v. Robinson*, 55 Md. 419; *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

<sup>1</sup> *Vickers v. Battershall*, 84 Hun, 496, 32 N. Y. S. 314.

<sup>2</sup> See *infra*, § 637.

<sup>3</sup> See *supra*, § 634.

<sup>4</sup> See *Marsh v. McNair*, 99 N. Y. 174, 1 N. E. 660. The distinction seems to have been lost sight of in *Davidson v. Young*, 167 Pa. 265, 31 Atl. 557.

but that he is not so likely to make a written contract promising to transfer Blackacre in absolute form when the understanding of the parties is, as before, that the transaction shall be defeasible upon a certain contingency. No satisfactory distinction seems possible on the score of forfeiture. It is true that there may be a greater element of forfeiture in enforcing an absolute conveyance as such when it was intended as a mortgage than in enforcing an absolute promise in spite of an oral condition subsequent; but this is not necessarily the case. Moreover, though the facts giving rise to an implied or resulting trust may be shown by parol to establish that property conveyed in absolute terms is held upon a trust for another,<sup>5</sup> it is said that an express agreement to hold in trust cannot be so established.<sup>6</sup> And yet the forfeiture here may be quite as great as in the mortgage case.

### § 636. An incomplete writing may be added to by parol.

The parol evidence rule assumes agreement upon the writing in question as a complete statement of the bargain. If the parties never adopted the writing as a statement of the whole agreement, the rule does not exclude parol evidence of additional promises.<sup>7</sup>

<sup>5</sup> Perry on Trusts, § 137.

<sup>6</sup> *Ibid.*, § 76. The cases cited by the author for the proposition seem to have related to real estate and to have been based on the section of the Statute of Frauds relating to trusts and not on the parol evidence rule.

<sup>7</sup> *Harris v. Rickett*, 4 H. & N. 1; *Lafitte v. Shawcross*, 12 Fed. 519; *In re Baird*, 245 Fed. 504; *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1; *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736; *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681; *Mason v. Griffin*, 281 Ill. 246, 118 N. E. 18; *Louisville N. A., etc., R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711; *Carfield Lumber Co. v. Kint Lumber Co.*, 148 Ia. 207, 127 N. W. 70; *Royer v. Western Silo Co.*, 92 Kan. 333, 140 Pac. 872; *Grant v. Frost*, 80 Me. 202, 13 Atl. 881; *Davis*

*v. Cress*, 214 Mass. 379, 101 N. E. 1081; *Lyman B. Brooks Co. v. Wilson*, 218 Mass. 205, 105 N. E. 607; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 529; *Locke v. Wilson*, 135 Mich. 593, 98 N. W. 400; *Davis v. Scovern*, 130 Mo. 303, 32 S. W. 986; *Strickland v. Johnson*, 21 N. Mex. 599, 157 Pac. 142; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Rochester Folding Box Co. v. Browne*, 55 N. Y. App. Div. 444, 66 N. Y. S. 867, *affd.* 166 N. Y. 635, 60 N. E. 1120; *Leifer v. Scheinman*, 179 N. Y. App. D. 665, 167 N. Y. S. 105; *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811; *Putnam v. Prouty*, 24 N. Dak. 517, 140 N. W. 93; *O. K. Transfer &c. Co. v. Neill*, (Okl. 1916), 159 Pac. 272, L. R. A. 1917 A. 58; *Selig v. Reh fuss*, 195 Pa. St. 200, 45 Atl. 919; *Virginia-Carolina Chemical Co. v.*

It should be observed, however, that a writing though incomplete may, nevertheless, be adopted as the expression by the parties of that portion of their agreement to which it relates. Accordingly, if a contract is even partially reduced to writing, the written portion is no more subject to contradiction by parol than the entire contract would be had it been wholly reduced to writing.<sup>8</sup> It has been suggested<sup>9</sup> that this mode of expression is inexact, and that always where what is called partial integration exists there is in fact an entire integration of the matter to which the writing relates; and that the outside oral agreement is a different subject-matter. Plausible as this sounds, it seems of doubtful accuracy as a universal proposition. To say that the agreement of an accommodation indorser that he shall be held harmless by the accommodated party is a separate subject from the contract which he enters into by his accommodation signature seems artificial; and certainly if that mode of expression is adopted, the question of what is a distinct subject is so difficult, that the inquiry suggested affords no help towards the solution of the ultimate problem

Moore, 61 S. C. 166, 39 S. E. 346; Palmer v. Lawrence, 72 Vt. 14, 47 Atl. 159; Knowles v. Rogers, 27 Wash. 211, 67 Pac. 572; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

This principle was well expressed by Fuller, C. J., in *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. Ed. 837. "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction

as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. Greenl. Ev., § 275." Cf. *Vogt v. Shienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

<sup>8</sup> *Jeffery v. Walton*, 1 Stark. 267; *Whatley v. Reese*, 128 Ala. 500, 29 So. 606; *Blair v. Buttolph*, 72 Ia. 31, 33 N. W. 349; *Davis v. Cress*, 214 Mass. 379, 101 N. E. 1081; *Hutchison Mfg. Co. v. Pinch*, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; *Horn v. Hansen*, 56 Minn. 43, 46, 57 N. W. 315, 22 L. R. A. 617; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811.

<sup>9</sup> *Wigmore on Evidence*, §2430.

of whether a particular oral agreement is admissible. How it may be decided whether a given writing is a complete integration, or only a partial integration has already been considered.<sup>10</sup>

**§ 637. There may be entirely distinct contemporaneous oral and written agreements.**

The mere fact that an oral agreement is contemporaneous with a written one does not necessarily involve the conclusion that they are part of the same contract. Two entirely distinct contracts each for a separate consideration may be made at the same time and will be entirely distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. In the following discussion, it is assumed that there is at least this bond; and then if one of the agreements is oral and the other is written, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement. It is now also assumed that the writing is an integration of a contract between the parties, and the inquiry is how far does the integration extend.

**§ 638. Test for determining whether an oral agreement is so far separate and collateral as to be admissible.**

A distinction doubtless exists between collateral agreements and agreements which are logically part of the main body of an agreement. This collateral character supposedly may be matter of form or matter of substance. Where an agreement contains several promises on each side, it is ordinarily easy to put any one of them in the form of a collateral agreement. This, however, cannot be the sort of thing intended when it is said that a collateral parol agreement may be proved; for, necessarily in such a case the parol promise which it is sought to add to the writing is collateral in form; and if this were enough any parol agreement might be proved. A distinction must therefore be attempted between promises which are intended to be or are inherently and substantially collateral to the main purpose of the contract as distinguished

<sup>10</sup> *Supra*, § 633.

from those which directly relate to the main object. It need not be denied that such a distinction is logically conceivable or that cases can be put of promises of one sort or the other. But unquestionably to differentiate the promises in contracts as they arise, as either collateral or the reverse, is very difficult and sometimes nearly if not quite impossible. It is probable that however the matter may be phrased, the reason guiding the courts in admitting or excluding proof of additional oral terms to an apparently complete written contract, is rather practical than theoretical.

Two suggestions may be made to serve as a guide to the many decisions apparently often contradicting one another, before considering the subject in detail. First that the test of admissibility is much affected by the inherent probability of parties who contract under the circumstances in question, simultaneously making the agreement in writing which is before the court, and also the alleged parol agreement. The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so. If that is true, the parol agreement is so far collateral and separate from the writing as to make it admissible. The second suggestion is that the tendency of the courts is toward increasing liberality in the admission of parol agreements.

**§ 639. Collateral parol agreements contradicting a written contract are inadmissible.**

The general rule is clear that a parol agreement which is in terms contradictory of the express words of a contemporaneous or subsequent written contract, properly construed, necessarily is ineffectual and evidence of it inadmissible, whether the parol agreement be called collateral or not.<sup>11</sup> If

<sup>11</sup> *St. Louis, etc., Fireproofing Co. v. Standard Fireproofing Co.*, 195 U. S. 627, 49 L. Ed. 351, 25 S. Ct. 792; *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855; *Hodson v. Varney*, 122 Cal. 619, 55 Pac. 413; *Chattanooga, etc., R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; *Unity Co. v. Equitable Trust Co.*, 204

Ill. 595, 68 N. E. 654; *Western Electric Co. v. Bærthel*, 127 Ia. 467, 103 N. W. 475; *Bounanni v. White Bronze Monument Co.*, 131 Ia. 304, 108 N. W. 524; *Merritt v. Peninsular Const. Co.*, 91 Md. 453, 46 Atl. 1013; *Pike v. McIntosh*, 167 Mass. 309, 45 N. E. 749; *Dean v. Washburn & Moen Mfg. Co.*,

there are exceptions to the rule they are made where a formal instrument is issued in its usual form, but its terms limited by a parol agreement.<sup>12</sup> Even where the parol agreement is not in terms contradictory of the writing, the implication in fact of the writing may be clear that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by parol is no more permissible than to contradict the direct words of the writing, but it is often a question of extreme difficulty to determine whether the writing does, if fairly construed, imply that its statements contain the whole agreement of the parties either in regard to the whole subject-matter of the contract, or in regard to some particular provision. The test usually suggested in the cases, whether the collateral agreement "varies or contradicts" the terms of the writing, has been criticised<sup>13</sup> and the suggestion made that the "most satisfactory index for a judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing." Though the ordinary statement is open to misapprehension, it is not, when properly understood, open to the criticism which has been made that it involves either a contradiction in terms or reasoning in a circle. It is true that a collateral agreement if admissible, will always vary the legal effect of a writing, or there would be no occasion to prove it, and if under "variation" is included any addition to the general subject of the contract, that word certainly is inaccurate, since it would exclude all oral collateral agreements. It does not follow, however, that an oral agreement which is of value will contradict the terms of the writing. As has been seen it may contradict only the implications of fact or law which would be drawn from the writing if the collateral agreement was not admitted to proof. The index suggested by Wigmore is, very likely, more satisfactory and less open to misapprehension; but it should be observed that this is no final test which can be applied with

177 Mass. 137, 58 N. E. 162; Calmenson v. Equitable Mut. F. I. Co., 92 Minn. 390, 100 N. W. 88; Hebbard v. American Sheet Metal Lath Co., 150 N. Y. S. 72; Hatfield v. Thomas Iron Co., 208 Pa. 478, 57 Atl. 950; Minnesota

Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803; Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664; Patterson v. Cappon, 125 Wis. 198, 102 N. W. 1083.

<sup>12</sup> See *infra*, §§ 644, 645.

<sup>13</sup> Wigmore on Evidence, § 2430.

unvarying regularity. When an accommodation indorser signs a note, the matter of his liability is dealt with in the writing; nevertheless the collateral agreement may be shown. When goods are sold under a written contract, the subject of the seller's liability for defects may not be dealt with at all, yet many courts exclude evidence of a parol warranty.<sup>14</sup> Moreover, what is to be regarded as the "particular element of the extrinsic negotiation" is always open to question. In the case of the warranty, is the particular element the general liability of the seller in regard to the goods, or is it his liability for defects of quality? Is a warranty of title part of the same element as a warranty of quality? Is a warranty of one quality part of the same element as a warranty of another quality? There is here the same inescapable difficulty that exists when an attempt is made to determine whether the oral agreement contradicts the writing. A written promise to pay \$50 is not in terms contradicted by an oral promise to pay \$25 more, but the natural implication from the written promise is irresistible that \$50 is the whole cash payment which the promisor is to make. This implication arises because as a matter of actual practice, one who was intending to promise \$75 would put his promise in the form of a single promise to pay that sum, rather than in that of a written promise to pay \$50 and a separate agreement to pay \$25 in addition.<sup>15</sup> So if the other test is applied, it may be said that the "particular element" of the alleged extrinsic negotiation is the price, and the oral agreement is inadmissible. Suppose the oral agreement instead of providing for an additional payment of \$25 provided for the giving a book, is the "particular element" of this agreement payment of consideration and therefore dealt with in the writing, or payment of non-pecuniary consideration and therefore not dealt with therein? Whether under the rule as ordinarily expressed a collateral agreement tends to contradict the implications of the writing or under the suggested improvement thereon relates to a "particular element" dealt with in the

<sup>14</sup> See *infra*, § 643.

N. Y. S. 494, *affd.* 178 N. Y. 637, 71 N. E. 1133. *Cf.* *Malpas v. London & S. W. R. Co.*, L. R. 1 C. P. 336.

<sup>15</sup> See *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829; *McGarrigle v. McCosker*, 83 N. Y. App. Div. 184, 82

writing will depend in large measure on the question whether a reasonable person making such an agreement as is set up both in the writing and in the proffered parol evidence might naturally have separated the matters into two parts.

**§ 640. Collateral agreements contradicting an implication of law.**

It has been questioned whether a parol agreement is admissible which definitely expresses the intent of the parties in regard to a matter covered neither expressly nor by implication of fact in the written contract between them, but concerning which the law makes an implication in the absence of express agreement. Thus where no time or place for performance is fixed, the law fixes the time or place in accordance with certain rules, which in many cases at least are based on what is reasonable rather than what is actually intended. Are these rules part of the contract and therefore does parol agreement with reference to their subject-matter contradict the writing? It is so generally held. Especially it has been held that evidence of a parol agreement that performance should be made at a particular time is inadmissible where the writing specifies no time for performance.<sup>16</sup> But the criticism which has been made previously<sup>17</sup> of the theory that the law governing a contract is necessarily adopted into the contract as part of its terms, seems applicable here. The parties to a negotiable note which does not specify the time of payment probably understand and recognize that the writing is equivalent to a promise to pay on demand, and therefore a parol agreement to pay at a fixed time would be inconsistent with the writing.<sup>18</sup> The legal implication from a blank indorsement also is perfectly understood by the parties, and the implication may well be given the same effect as if the indorsement were filled out,<sup>19</sup> but the contradiction is

<sup>16</sup> *Greaves v. Ashlin*, 3 Camp. 426; *Ford v. Yates*, 2 M. & G. 549; *Simpson v. Henderson*, Moo. & M. 300; *Roughton v. Brookings Lumber &c. Co.*, 26 Cal. App. 752, 148 Pac. 539; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Warren v. Wheeler*, 8 Met. 97; *Coon v. Spaulding*, 47 Mich. 162, 10 N. W. 183; *American Bridge Co. v. American &c.*

*Steam Co.*, 107 Minn. 140, 119 N. W. 783; *Blake Mfg. Co. v. Jæger*, 81 Mo. App. 239; *Thompson v. Ketcham*, 8 Johns. 189 (note); *Oliver v. Heil*, 95 Wis. 364, 70 N. W. 346.

<sup>17</sup> *Supra*, § 615.

<sup>18</sup> *Bloom v. Horwitz*, 100 N. Y. Misc. 687, 166 N. Y. S. 786.

<sup>19</sup> See *supra*, § 644.

one fictitiously invented by the law when an ordinary contract does not state the time for performance, and the parties orally agree on a particular time. Undoubtedly it is not always easy to determine whether an implication is one of fact, and therefore the agreement of the parties, or is one of law imposed upon the parties because of their failure to express an agreement upon the matter in question, but the distinction is none the less real. Some decisions, recognizing this, have allowed proof of parol agreement fixing the time,<sup>20</sup> or place<sup>21</sup> of performance. A contract for the shipment of goods from one place to another without specification of the route,<sup>22</sup> and contracts containing other legal implications have given rise to the same difference of opinion.<sup>23</sup>

#### § 641. Other inadmissible collateral agreements.

Following the analogy of cases holding that though parol conditions precedent to the effectiveness of a written agreement may be shown, conditions subsequent may not be,<sup>24</sup> it has been held that parol evidence of an agreement that goods

<sup>20</sup> *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Wolters v. King*, 119 Cal. 172, 51 Pac. 35; *Bankers' Acc. Ins. Co. v. Rogers*, 73 Minn. 12, 75 N. W. 747 (time for which insurance was written not being stated in policy or application may be shown by parol); *Stephens-Adamson Mfg. Co. v. Bigelow*, 84 N. J. L. 585, 87 Atl. 74, 86 N. J. L. 707, 92 Atl. 398. (The offer which was accepted read, "Time of delivery to be about . . . from receipt by us of your acceptance." Parol evidence was admitted of the fixed time orally agreed upon.) *Eichenaur v. Rentz Candy Co.*, 43 N. Y. Misc. 151, 88 N. Y. S. 260 (term of service shown to be for one year). See also *Paul v. Owings*, 32 Md. 402 (a written contract to sell land for \$5,000 was held not to preclude parol evidence of the manner or terms of payment, as by application on a judgment).

<sup>21</sup> *Ebert v. Arends*, 190 Ill. 221, 60 N. E. 211. But see *LaFarge v. Rickert*,

5 Wend. 187, 21 Amer. Dec. 209; *State v. Kenosha Home Tel. Co.*, 158 Wis. 371, 148 N. W. 877, Ann. Cas. 1916 E. 365. In *Delaware v. Oregon Iron Co.*, 14 Wall. 579, 20 L. Ed. 779, a bill of lading not stating the place of storage was held contradicted in legal effect by a parol agreement that the goods should be stowed on deck and evidence of the agreement was held inadmissible.

<sup>22</sup> A parol agreement fixing the route was not admitted in *Webster v. Paul*, 10 Ohio St. 531, but the contrary was held in *Louisville, etc., R. Co. v. Duncan*, 137 Ala. 446, 34 So. 988.

<sup>23</sup> In *Sowers v. Earnhart*, 64 N. C. 96, a bond for \$1,000 was given in 1862, payable one day after date. The court said "By presumption of law this note was solvable in Confederate money," but gave effect to a parol agreement that the bond should be paid in money good after the war.

<sup>24</sup> See *supra*, § 634.

might be returned is not admissible to qualify an absolute written contract of sale; <sup>25</sup> nor where there is a writing showing a sale can it be proved by parol that the transaction was a bailment.<sup>26</sup> Other cases where parol collateral agreements were held inadmissible are collected in the accompanying note.<sup>27</sup>

### § 642. Admissible collateral agreements.

Where the writing in question is a unilateral conveyance,

<sup>25</sup> *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602. See also *Grabfelder v. Vosburgh*, 90 N. Y. App. Div. 307, 85 N. Y. S. 633. *Cf. Gilman v. Williams*, 74 Vt. 327, 52 Atl. 428.

<sup>26</sup> *Price v. Marthen*, 122 Mich. 655, 81 N. W. 551; *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. *Cf. mortgage cases, supra*, § 635.

<sup>27</sup> *Sun Printing, etc., Assoc. v. Edwards*, 113 Fed. 445, 51 C. C. A. 279; *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 61 C. C. A. 657 (parol agreement that work under written contract should be done to defendant's satisfaction or need not be paid for); *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723 (parol agreement that written contract might be terminated at will); *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795 (parol agreement that part of price named in writing was for an alleged oral warranty); *Connor v. Lasseter*, 98 Ga. 708, 25 S. E. 830 (parol agreement to obtain other paid employment and credit pay received therefor on amount due under written contract); *McElveen v. Southern R. Co.*, 109 Ga. 249, 34 S. E. 281, 77 Am. St. 371; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28 (parol agreement that goods contracted for under written contract should be of the seller's own production); *Bounanni v. White Bronze Monument Co.*, 131 Ia. 304, 108 N. W. 524 (parol agreement that a statue should in a certain respect differ from

a photograph though writing demanded a copy thereof); *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392 (parol agreement that a railroad ticket in terms limited should be unlimited); *Castleman v. Southern Mut. L. I. Co.*, 14 Bush, 197 (parol agreement for additional compensation); *Sutton v. Kentucky Lumber Co.*, 19 Ky. L. Rep. 1604, 44 S. W. 86 (parol agreement to furnish right of way for teams to carry lumber to be cut and hauled under written contract); *Goldenberg v. Taglino*, 218 Mass. 357, 105 N. E. 883 [parol agreement as to the nature of services under a written contract for general employment. *Cf. Price v. Mouat*, 11 C. B. (N. S.) 508]; *Smith v. Smull*, 69 N. Y. App. Div. 452, 74 N. Y. S. 1012; *Eden v. Silberberg*, 89 N. Y. App. Div. 259, 85 N. Y. S. 781; *Cornwall R. Co. v. Cornwall & C. R. Co.*, 125 Pa. 232, 17 Atl. 427, 11 Am. St. 889; *Farrell v. Coatesville*, 214 Pa. 296, 63 Atl. 742 (parol agreement that rock excavation should be specially paid for at a higher rate than that named for excavation generally in written contract); *Wallace v. Langston*, 52 S. Car. 133, 29 S. E. 552 (parol agreement with the signer of a bond that he should not be liable); *Missouri, etc., Ry. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1139; *Nelson v. Godfrey*, 74 Vt. 470, 52 Atl. 1037 (parol agreement that letters on a tablet for which a written contract provided, should be raised). See also *Empire Inv. Co. v. Mort*, 169 Cal. 732, 147 Pac. 960.



### § 643. Parol evidence of a warranty.

There is no more frequent application of the parol evidence rule than in cases where it is sought to attach a parol warranty to a written sale or contract to sell goods. If the writing states in terms that there is no warranty or none except what is contained in the writing, it is clear that the parol warranty is ineffectual because contradictory and not merely additional to the writing.<sup>34</sup> Where the writing contains an express warranty, proof of an additional parol warranty is also not allowable. This is most obviously a necessary conclusion where the parol warranty concerns the same quality or attribute of the goods as the written warranty;<sup>35</sup> but it is also commonly held that the parol warranty is inadmissible if any express

64 Am. St. Rep. 221 (parol agreement as to the scaling of lumber contracted for in writing, admitted when the writing made no provision as to scale or scales); *Cook v. Littlefield*, 98 Me. 299, 56 Atl. 899; *Ryder v. Faxon*, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417; *Hawley Down-Draft Furnace Co. v. Hooper*, 90 Md. 390, 45 Atl. 456; *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398; *Huffman v. Ellis*, 64 Neb. 623, 90 N. W. 552; *Creedon v. Patrick*, 3 Neb. unoff. 459, 91 N. W. 872 (oral agreement where building materials should be obtained, admitted); *Polakoff v. Halphen*, 83 N. J. Eq. 126, 89 Atl. 996 (a written license to erect a building was supplemented by an oral agreement as to the character of the building); *Daly v. Piza*, 105 N. Y. App. Div. 496, 94 N. Y. S. 154; *Holmboe v. Morgan*, 69 Oreg. 395, 138 Pac. 1084 (a written contract for sale of automobile was supplemented by a parol agreement to give instruction); *Potlatch Lumber Co. v. North Coast Produce Co.*, 78 Wash. 533, 139 Pac. 496. Pennsylvania seems to have gone further than most States in allowing such evidence. In *Alexander v. Richter*, 240 Pa. 22, 26, 87 Atl. 427, the court said: "We have ruled more than once

that even where there is a written unconditinal promise to pay, in a suit thereon between the original parties, one may show a contemporaneous agreement that the promisee would look to a special fund for the payment, where such agreement constituted a part of the consideration of the written contract or operated as an inducement for entering it." Cf. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Murchi v. Peck*, 160 Ill. 175, 43 N. E. 356; *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66; *Wilson v. Wilson*, 26 Oreg. 251, 38 Pac. 185; *Fuller v. Law*, 207 Pa. 101, 56 Atl. 333.

<sup>34</sup> *Allen v. Young*, 62 Ga. 617; *Martin v. Moore*, 63 Ga. 531; *Stewart v. Blalock*, 20 Ga. App. 488, 93 S. E. 116; *Otto v. Braman*, 142 Mich. 185, 105 N. W. 601; *Plano Mfg. Co. v. Root*, 3 N. Dak. 165, 54 N. W. 924.

<sup>35</sup> *Middletown Mach. Co. v. Chaffin*, 108 Ark. 254, 157 S. W. 398; *United Iron Works v. Outer Harbor Co.*, 168 Cal. 81, 141 Pac. 917; *Barrett v. Wheeler*, 71 Ia. 662, 33 N. W. 230; *Rice v. Codman*, 1 Allen, 377; *Colt v. Demarest*, 159 N. Y. App. Div. 394, 144 N. Y. S. 557; *Buchanan v. Laber*, 39 Wash. 410, 81 Pac. 911.



contract, the reason for applying the parol evidence rule is lacking and extrinsic evidence of a warranty is admitted.<sup>38</sup> It must be admitted that the principle thus stated is one very difficult of application, and the decisions cited in the two notes last referred to are not all easy to reconcile on their facts. Another principle which has not yet been very clearly brought out by the cases should be plain wherever it is recognized that an affirmation or representation may form the basis of liability in warranty even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties contracted in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Such is frequently the case with warranties.<sup>39</sup> Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course, be proved and if a false but honest statement, inducing the buyer to enter into the bargain, renders the seller liable as a warrantor though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was

<sup>38</sup> *Allen v. Pink*, 4 M. & W. 140; *Harris v. Marsh*, 217 Fed. 555, 133 C. C. A. 407; *Florence Wagon Works v. Trinidad Mfg. Co.*, 145 Ala. 677, 40 So. 49; *Ruff v. Jarrett*, 94 Ill. 475; *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. 12; *Chicago Telephone Supply Co. v. Morne & Co. Tel. Co.*, 134 Ia. 252, 111 N. W. 935; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *White Automobile Co. v. Dorsey*, 119 Md. 25, 86 Atl. 617; *Atwater v. Clancy*, 107 Mass. 369; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682; *Phelps v. Whitaker*, 37

Mich. 72; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449; *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240, 22 N. W. 414; *McMullen v. Williams*, 5 Ont. App. 518.

<sup>39</sup> See Williston on Sales, § 197.

reduced to writing.<sup>40</sup> The same question in regard to parol evidence that arises in regard to warranties generally, arises in the case of sales by sample. If a written contract is made which makes no mention of a sample, is parol evidence admissible to show that the contract was made with reference to a sample? The same principles which have been laid down in regard to warranties generally govern here also. If the writing purports to state the whole contract between the parties, the parol evidence rule would seem to forbid the buyer to show that it was in fact part of the contract that the goods should correspond with a sample.<sup>41</sup> But if a written contract for goods is procured by representing that the goods described in the writing are like a sample which is exhibited, it seems that parol evidence should be admitted to prove these representations and that the seller should be liable as warranting the truth of them. They are not part of the contract, but the law should impose a quasi-contractual obligation upon one who makes such statements.<sup>42</sup>

#### § 644. Agreements collateral to negotiable paper.

There is a practical reason why parties who make negotiable paper with additional oral agreements should adopt that course rather than put the whole agreement into one writing. If a

<sup>40</sup> This argument is fully supported by the case of *De Lassalle v. Guildford*, [1901] 2 K. B. 215. In that case though the parties had entered into a formal lease, a contract of considerable solemnity, the plaintiff was allowed to prove that he took the lease only on receiving an oral assurance that the drains were in order, and the defendant was held liable upon this as upon a warranty collateral to the lease. See also the numerous similar decisions, *infra*, § 645, on agreements collateral to deeds. So in the case of *Waterbury v. Russell*, 8 Baxt. 159, it was held that misrepresentation as to the character of goods, made to influence the bargain, were warranties, though not inserted in the written contract of sale. But see *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39; *Telluride Power Co. v. Crane*,

103 Ill. App. 647, which held that such representations could not be shown unless fraudulent. See also *Seitz v. Brewer Refrigerator Co.*, 141 U. S. 510, 12 S. Ct. 46, 30 L. Ed. 837; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, and cases cited *supra*, n. 38; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682.

<sup>41</sup> *Meyer v. Everth*, 4 Campb. 22; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433.

<sup>42</sup> In *Pike v. Fay*, 101 Mass. 134, there was a written order for willow cuttings. Parol evidence was held admissible to show that the sale was induced by the exhibition of samples.

collateral agreement is written on the instrument it ceases to be negotiable, and the parties frequently desire that the features of a negotiable instrument shall be retained. Probably for this reason the courts, though professing to apply the same doctrine with reference to parol evidence where negotiable instruments are concerned as where other written contracts are in question, have, nevertheless, frequently been more ready, where the controversy involved no holder in due course, to admit parol evidence of collateral agreements. Not only in such a case may it be shown that a negotiable instrument or an obligation thereon is given in escrow and has never become binding,<sup>43</sup> but it may also be shown that the signature of a party to a negotiable instrument is for accommodation or without consideration,<sup>44</sup> or is an indorsement for collec-

<sup>43</sup> *Jefferies v. Austin*, 1 Strange, 674; *Bell v. Ingestre*, 12 Q. B. 317; *Burke v. Dulaney*, 153 U. S. 228, 38 L. Ed. 698, 14 S. Ct. 816; *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N. S.) 288; *Parker v. Bond*, 121 Ala. 529, 25 So. 898; *Graham v. Remmel*, 76 Ark. 140, 88 S. W. 899; *Ager v. Duncan*, 50 Cal. 325, 327; *Denver Brewing Co. v. Barets*, 9 Colo. App. 341, 48 Pac. 834; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Scott Adm'x v. Scott*, 33 Ga. 102; *Bragg v. Stanford*, 82 Ind. 234; *Gray v. Anderson*, 99 Ia. 342, 68 N. W. 790, 61 Am. St. Rep. 243; *Oakland Cemetery Assoc. v. Lakins*, 126 Ia. 121, 101 N. W. 778; *Caudle v. Ford*, 24 Ky. L. Rep. 1764, 72 S. W. 270; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831, 80 N. E. 605; *Hamburger v. Miller*, 48 Md. 317 (indorsement); *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Hardin v. Wright*, 32 Mo. 452; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Williams v. First Nat. Bank*, 45 N. Y. App. Div. 239, 60 N. Y. S. 1105, affd. 167 N. Y. 594, 60 N. E. 1122; *Morris v. Faurot*,

21 Ohio St. 155, 8 Am. Rep. 45; *La Grande Nat. Bank v. Blum*, 26 Ore. 49, 37 Pac. 48; *Merkel's Appeal*, 89 Pa. 340; *Camp v. Page*, 42 Vt. 739. But some decisions hold, following the analogy of sealed instruments, that negotiable paper cannot be delivered to the payee as an escrow. *Garner v. Fite*, 93 Ala. 405, 9 So. 367; *Clanin v. Easterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, 37 N. E. 736; and see *Shaw v. Shaw*, 50 Me. 94, 79 Am. Dec. 605; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

<sup>44</sup> *Thompson v. Clubley*, 1 M. & W. 212; *Castrique v. Buttigieg*, 10 Moore P. C. 94; *Cohen v. Goux*, 48 Cal. 97; *Case v. Spaulding*, 24 Conn. 578; *Larned v. Ogilby*, 20 Ia. 410; *State Bank v. Pangerl*, 139 Minn. 19, 165 N. W. 479; *Trego v. Lowrey*, 8 Neb. 238; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Haddock v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *M. Rumely Co. v. Anderson*, 35 S. Dak. 114, 150 N. W. 939. Cf. *Abrey v. Crux*, L. R. 5 C. P. 37.

tion;<sup>45</sup> or that the signer signed a draft or indorsement merely to transfer money to his principal by giving the latter the obligation of one with whom the agent has dealt on behalf of the principal.<sup>46</sup> It may also be shown that parties appearing to be indorser and indorsee, are co-sureties; and agreed as between one another to share their liability equally,<sup>47</sup> or that one accommodation indorser agreed to indemnify another.<sup>48</sup> And it may be shown that the date is erroneous, even though altering the date alters the effect of the promise in the note by changing the time of maturity.<sup>49</sup> On the other hand, except so far as the admissibility of proof of a suretyship relation qualifies the statement, it cannot be shown that the obligation of the maker,<sup>50</sup>

<sup>45</sup> *Denton v. Peters*, L. R. 5 Q. B. 475; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 20; *Johnston v. Schnabaum*, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838; *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Galceran v. Noble*, 66 Ga. 367; *Woodward v. Foster*, 18 Gratt. 200. But see *contra*, *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580.

<sup>46</sup> *Castrique v. Buttigieg*, 10 Moore P. C. 94; *First Nat. Bank v. Reinman*, 93 Ark. 376, 125 S. W. 443, 28 L. R. A. (N. S.) 530; *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Farmers' Sav. Bank v. Hausmann*, 114 Ia. 49, 86 N. W. 31; *Wolfe v. Jewett*, 10 La. 383; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *McAllister v. Budd*, 33 Mo. 417; *Hicks v. Hinde*, 9 Barb. 528; *Dickinson v. Burke*, 8 N. Dak. 118, 77 N. W. 279; *Roberts v. Austin*, 5 Whart. 313; *Abraham v. Mitchell*, 112 Pa. 230, 3 Atl. 830, 56 Am. Rep. 312. But see *contra*—*Day v. Thompson*, 65 Ala. 269; *Hancock v. Fairfield*, 30 Me. 299; *Tucker Co. v. Fairbanks*, 98 Mass. 101.

<sup>47</sup> *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 396; *Rhodes v. Sherrod*, 9 Ala. 63; *Edelen v. White*, 6 Bush, 408; *Smith v. Morrill*, 54 Me. 48; *Clapp v. Rice*, 13 Gray, 403, 406, 74 Am. Dec. 639; *Farwell v. Ensign*, 66 Mich. 600,

33 N. W. 734; *Dunn v. Wade*, 23 Mo. 207; *Paul v. Ryder*, 58 N. H. 119; *Easterly v. Barber*, 66 N. Y. 433; *Egbert v. Hanson*, 34 N. Y. Misc. 596, 70 N. Y. S. 383; *Kelley v. Few*, 18 Ohio, 441; *Montgomery v. Page*, 29 Oreg. 320, 44 Pac. 689; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *In re Marquardt's Est.*, 251 Pa. 73, 95 Atl. 917; *Sloan v. Gibbs*, 56 S. Car. 480, 35 S. E. 408, 76 Am. St. Rep. 559. See also *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915.

<sup>48</sup> *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413; *Feile v. Rudiger* (N. J. Eq.), 104 Atl. 142; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230. See also *Lynch v. Lofton*, 153 N. C. 270, 69 S. E. 143; *Davis v. First Nat. Bank*, 86 Oreg. 474, 168 Pac. 929; and the express provision of the Uniform Negotiable Instruments Law, *infra*, § 1163. As to the relation of accommodation indorsers to one another see *infra*, § 1282.

<sup>49</sup> *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. 851.

<sup>50</sup> *Moseley v. Hanford*, 10 B. & C. 729; *Selden v. Myers*, 20 How. 506, 15 L. Ed. 976; *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Earle v. Enos*, 130 Fed. 467; *Bomar v. Rosser*, 131 Ala. 215, 31 So. 430; *Tisdale v. Mallett*, 73 Ark. 431, 84 S. W. 481; *Guy v. Bibend*,

acceptor,<sup>51</sup> drawer,<sup>52</sup> or guarantor<sup>53</sup> is other than the obligation imposed by the custom of merchants upon persons who sign apparently in such capacity. A note in form joint,<sup>54</sup> or joint and several,<sup>55, 56</sup> cannot be shown by parol to impose obligations other than those appropriate to that form. Similarly an indorsement cannot be shown to be merely a transfer without recourse or a guaranty of identity, or anything other than an indorsement within the custom of merchants.<sup>57</sup> Whether this principle is applicable to an irregular or anomalous indorsement was matter of much dispute prior to the enactment of the Uniform Negotiable Instruments Law.<sup>58</sup> This statute,

41 Cal. 322; *Haley v. Evans*, 60 Ga. 157; *Walker v. Crawford*, 56 Ill. 444, 8 Am. Rep. 701; *Potter v. Earnest*, 45 Ind. 416; *Clement v. Houck*, 113 Ia. 504, 85 N. W. 765; *Shaw v. Shaw*, 50 Me. 94, 79 Am. Dec. 605; *Currier v. Hale*, 8 Allen, 47; *True v. Shepard*, 51 N. H. 501; *Colbert v. First Nat. Bank*, 38 Okl. 391, 133 Pac. 206; *Heist v. Hart*, 73 Pa. 286; *Morse v. Low*, 44 Vt. 561; *Hemrich v. Wist*, 19 Wash. 516, 53 Pac. 710; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28. Cf. *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Murdy v. Skyles*, 101 Ia. 549, 70 N. W. 714, 63 Am. St. Rep. 411; *Hansen v. Yturria* (Tex. Civ. App.), 48 S. W. 795.

<sup>51</sup> *Young v. Austen*, L. R. 4 C. P. 553; *Cowles v. Townsend*, 31 Ala. 133; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; *Crane v. Williamson*, 111 Ky. 271, 63 S. W. 610; *Sylvester v. Staples*, 44 Me. 496; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Mason v. Graff*, 35 Pa. 448; *Foster v. Hall*, 44 Wis. 568.

<sup>52</sup> *Abrey v. Crux*, L. R. 5 C. P. 37; *Citizens' Bank v. Millet*, 103 Ky. 1, 44 S. W. 366, 44 L. R. A. 664, 82 Am. St. Rep. 546.

<sup>53</sup> *Noble v. Beeman, Spaulding Co.*, 65 Oreg. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162. See also *Hibernia*

*Bank v. Dresser*, 132 La. 532, 61 So. 561.

<sup>54</sup> *Rumsey v. Fox*, 158 Mich. 248, 122 N. W. 526. See also *supra*, § 322.

<sup>55, 56</sup> *Parker v. Mayes*, 85 S. Car. 419, 67 S. E. 559.

<sup>57</sup> *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354; *Hopkins v. Commercial Bank*, 64 Fla. 310, 60 So. 183; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Cochran v. Atchison*, 27 Kans. 728; *First Nat. Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790; *Prescott Bank v. Caverly*, 7 Gray, 217, 66 Am. Dec. 473; *Aronson v. Nurenberg*, 218 Mass. 376, 105 N. E. 1056; *Burwell v. Gaylord*, 119 Minn. 426, 138 N. W. 685; *Lake Harriet State Bank v. Miller*, 138 Minn. 481, 164 N. W. 989; *Foley v. Emerald, etc., Co.*, 61 N. J. L. 428, 39 Atl. 650; *Bird v. Kay*, 40 N. Y. App. Div. 533, 58 N. Y. S. 170; *Washington Sav. Bank v. Ferguson*, 43 N. Y. App. Div. 74, 59 N. Y. S. 295; *Hodgens v. Jennings*, 148 N. Y. App. D. 879, 133 N. Y. S. 584; *Smith v. Caro*, 9 Oreg. 278; *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849; *Eaton v. McMahon*, 42 Wis. 484. See also *Barnstable Bank v. Ballou*, 119 Mass. 487.

<sup>58</sup> The decisions are collected and classified in 1 Ames' Cas. Bills and Notes, 269.

now in force in nearly all of the United States, provides,<sup>59</sup> that "where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser." In spite of this language, however, it has been held in several States<sup>60</sup> that parol evidence is still admissible to show as between the parties the liability which was actually intended. It has been well said that such decisions nullify the plain language of the statute;<sup>61</sup> and in Florida and Maryland contrary decisions have been made.<sup>62</sup> Where an indorsement is in blank, it has been said that there is no complete contract, but merely authority to write a contract above the signature. But by the custom of merchants the terms of the only contract which is authorized to be written over a blank indorsement are fixed, and there seems no more propriety in admitting evidence to vary the contract to be implied from the form of the instrument than if the terms were fully written out.<sup>63</sup> This argument is strengthened by the provisions of the Negotiable Instrument Law that "The signature of the indorser without additional words is a sufficient indorsement,"<sup>64</sup> and that an instrument indorsed in blank is payable to bearer,<sup>65</sup> for under these provisions it can hardly be said that a blank indorsement is incomplete. A parol agreement that an instrument need not be paid, or need not be paid in a certain contingency, or may be paid wholly or partly in merchandise or shall not be sued on when due, or shall be renewed, is also in violation of the parol

<sup>59</sup> Sec. 64, *infra*, § 1161.

<sup>60</sup> *Haddock Blanchard & Co., Inc. v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; *Kohn v. Consolidated Butter & E. Co.*, 30 N. Y. Misc. 725, 63 N. Y. S. 265; *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390. To the same effect is *Long v. Gwin*, 188 Ala. 196, 66 So. 88, 7 L. R. A. 599. The court does not cite the Negotiable Instruments Law though it was in force in the State. See also *Jenkins v. Coomber*, [1898] 2 Q. B. 168.

<sup>61</sup> Brannan, *Negotiable Instruments Law* (2d ed.), 78.

<sup>62</sup> *Baumeister v. Kuntz*, 53 Fla. 340,

42 So. 886; *Lightner v. Roach*, 126 Md. 474, 95 Atl. 62. See also *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847.

<sup>63</sup> *Torbert v. Montague*, 38 Col. 325, 87 Pac. 1145; *Seabury v. Hungerford*, 2 Hill, 80, 82; *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 383. Such an indorsement cannot be shown to have been made without recourse. *Randle v. Davis Coal Co.*, 15 App. Dist. Col. 357; *Matthews v. Richards*, 13 Ga. App. 412, 79 S. E. 227. See also *Woodward v. Foster*, 18 Gratt. 200.

<sup>64</sup> N. I. L., Sec. 31, *infra*, § 1149.

<sup>65</sup> *Id.* Sec. 9 (5), 34; *infra*, §§ 1139, 1151.

evidence rule.<sup>66</sup> Where parol agreements have been allowed to modify the apparent effect of contracts on negotiable paper, various explanations have been given. As for instance, that the effect of the parol evidence was to show lack of consideration, or that for other reasons no contract whatever had been entered into. While this may explain some cases, it will not explain all. It has also been suggested,<sup>67</sup> that the avoidance of circuitry of action is the real reason for admitting evidence of the parol agreement where it has been held admissible. The parol evidence offered, it is argued, shows a collateral agreement which would justify a cross action if recovery were allowed on the negotiable instrument. But the parol evidence rule as ordinarily applied does not merely exclude proof of prior or contemporaneous oral agreements when suit is brought upon the written contract, but denies validity to the oral agreement

<sup>66</sup> *Hoare v. Graham*, 3 Camp. 57; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *Payne v. Mutual Life Ins. Co.*, 141 Fed. 339, 72 C. C. A. 487; *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421; *Harmon v. Harmon*, 131 Ark. 501, 199 S. W. 553; *Dorsey v. Armor*, 10 Colo. App. 255, 50 Pac. 726; *Johnson v. Cobb*, 100 Ga. 139, 28 S. E. 72; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496; *Jensen v. McConnell*, 31 Idaho, 87, 169 Pac. 292; *Clayes v. White*, 65 Ill. 357; *Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184; *Clinton v. Royal*, 203 Ill. App. 248; *Graff v. Fox*, 204 Ill. App. 598; *Dominion Nat. Bank v. Manning*, 60 Kans. 729, 57 Pac. 949; *Slusher v. Conant*, 18 Ky. L. Rep. 660, 37 S. W. 579; *Ockington v. Law*, 66 Me. 551; *Henry Woods' Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; *Central Sav. Bank v. O'Connor*, 139 Mich. 82, 102 N. W. 280; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; *Lake Harriet State Bank v. Miller*, 138 Minn. 481, 164 N. W. 989; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep.

256; *Stiles v. Vandewater*, 48 N. J. L. 67, 4 Atl. 658; *Block v. Stevens*, 72 N. Y. App. Div. 246, 76 N. Y. S. 213; *Bijur Motor &c. Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 156 C. C. A. 298 (N. Y. D. C.); *Western Carolina Bank v. Moore*, 138 N. C. 529, 51 S. E. 79; *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616; *First State Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125; *Colvin v. Goff*, 82 Oreg. 314, 161 Pac. 568, L. R. A. 1917 C. 300; *Homewood People's Bank v. Heckert*, 207 Pa. 231, 56 Atl. 431; *Lewis v. Wilson*, 108 S. Car. 47, 93 S. E. 242; *Black Hills Trust & Sav. Bank v. Plunkett* (S. Dak.), 166 N. W. 527; *Hancock v. Edwards*, 7 Humph. 349; *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882. But see *Rosentock v. Montague*, 28 N. Y. Misc. 483, 59 N. Y. S. 500; *Quin v. Sexton*, 125 N. C. 447, 34 S. E. 542; *Farrington v. McNeill*, 174 N. C. 420, 93 S. E. 957; *Clinch Valley Co. v. Willing*, 180 Pa. 165, 36 Atl. 737, 57 Am. St. Rep. 626; *Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434.

<sup>67</sup> 2 Ames Cas. Bills & Notes, 804.

altogether.<sup>68</sup> If, therefore, parol evidence is more freely allowed in case of negotiable instruments than in that of other written contracts it must be for the reason suggested at the beginning of the section.

### § 645. Agreements collateral to deeds.

In a number of decisions parol agreements made by the grantor in a deed of conveyance or lease as part of the transaction, have been enforced.<sup>68a</sup> The same is true in many jurisdictions where an insurance policy has been involved.<sup>69</sup>

These decisions seem probably based on the fact that the written transaction between the parties was a formal deed of conveyance in which it was inappropriate to insert any minor collateral matter. But a parol agreement which contradicts the express or implied terms of a sealed instrument is of course inadmissible,<sup>70</sup> as where proof of a parol reservation of part of the property conveyed, is offered.<sup>71</sup>

<sup>68</sup> *Supra*, § 631.

<sup>68a</sup> *Morgan v. Griffith*, L. R. 6 Exch. 70 (agreement by lessor to keep down rabbits); *Erksine v. Adeane*, L. R. 8 Ch. 756 (agreement by lessor to kill the game and not let the shooting); *Angell v. Duke*, L. R. 10 Q. B. 174 (agreement by lessor to repair and send furniture to leased premises); *Henshaw v. Smith*, 102 Kans. 599, 171 Pac. 616 (agreement to pay for improvements and expense of moving); *Page v. Monks*, 5 Gray, 492 (agreement to pay for filling land); *Carr v. Dooley*, 119 Mass. 294 (agreement to build a sewer); *McCormick v. Cheevers*, 124 Mass. 262 (agreement to pay for filling); *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436 (agreement to grade and build a street and cause city water to be put in); *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427 (agreement not to sell other land below a certain price); *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Scott v. Asbury* (Mo. App.), 198 S. W. 1131 (agreement

by vendor of house to transfer medical practice with it); *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127; *Webber v. Loranger* (N. H.), 103 Atl. 1050 (agreement of lessor to repair premises); *Mayer v. Rothstein*, 167 N. Y. S. 503 (agreement as to repairs of leased premises); *Shughart v. Moore*, 78 Pa. 469; *Wolfe v. Arrott*, 109 Pa. 473, 1 Atl. 333 (*cf.* *Wood v. Carson*, 257 Pa. 522, 101 Atl. 811). See also *Kernodle v. Kernodle*, 174 N. C. 441, 93 S. E. 956 (bond for money).

<sup>69</sup> See *infra*, § 749.

<sup>70</sup> *Edison, etc., Co. v. Gibby Foundry Co.*, 194 Mass. 258, 80 N. E. 479; *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234; *Wallace v. Langston*, 52 S. Car. 133, 29 S. E. 552. But see *Mereness v. De Lemos*, 91 Conn. 651, 101 Atl. 8, where it was held contrary to *Edison, etc., Co. v. Gibby Foundry Co.*, *supra*, that an oral agreement by a grantor to pay taxes on the granted premises, was effectual though the deed contained a covenant against encumbrances.

<sup>71</sup> *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Hisey v. Troutman*, 84 Ind.

**§ 646. The parol evidence rule does not exclude merely oral agreements.**

As the basis of the parol evidence rule is that a certain writing or writings have been agreed upon by the parties or assumed by them as an integration or memorial of their agreement upon a certain matter, it necessarily follows that any transaction between them, outside of this memorial, cannot affect their obligations in regard to that matter. It will be of no consequence whether such outside matter is oral or written.<sup>72</sup> Nevertheless where there are several writings relating to the same matter, and one of them does not appear on its face to be a revision or substitute for another, it will generally be easier to find as a fact that the last writing was intended merely to supplement not to supersede the earlier writing or writings than a corresponding finding would be if the earlier agreements were oral.

**§ 647. Applications of the parol evidence rule to third persons.**

It is commonly said that the parol evidence rule is only applicable to the parties to a contract and does not apply to third persons, or only applies to them when they are trying to enforce rights under the contract.<sup>73</sup> This statement is likely

115; *Bricker v. Whisler*, (Ind. App.), 117 N. E. 550; *Brown v. Thurston*, 56 Me 126, 96 Am. Dec. 438; *Cauble v. Worsham*, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871. In *Caveny v. Curtis*, 257 Pa. 575, 101 Atl. 853, 654, the court said:—"The general rule is that preliminary agreements and understandings relating to the sale of land become merged in the deed. This rule, however, does not apply to independent covenants or provisions in an agreement of sale not intended by the parties to be incorporated in the deed. In such case the delivery of the conveyance is merely a part performance of the contract, which remains binding as to its further provisions. *Seldon v. Williams*, 9 Watts, 9; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Close v. Zell*, 141 Pa. 390, 21 Atl. 770, 23 Am. St. Rep. 296."

<sup>72</sup> *Wigmore on Evidence*, § 2400.

<sup>73</sup> *Sigua Iron Co. v. Greene*, 88 Fed. 207, 31 C. C. A. 477; *O'Shea v. New York, C. & St. L., etc., R. Co.*, 105 Fed. 559, 44 C. C. A. 601; *Central Coal, etc., Co. v. Good*, 120 Fed. 793, 57 C. C. A. 161; *Coleman v. Pike Co.*, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Northern Assur. Co. v. Chicago, etc., Assn.*, 198 Ill. 474, 64 N. E. 979; *Hubbard v. Harrison*, 38 Ind. 323; *Burns v. Thompson*, 91 Ind. 146; *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925; *Kellogg v. Tompson*, 142 Mass. 76, 6 N. E. 860; *Johnson v. Von Scholley*, 218 Mass. 454, 106 N. E. 17; *National Car, etc., Builder v. Cyclone, etc., Co.*, 49 Minn. 125, 51 N. W. 657; *McKim v. Metropolitan St. Ry. Co.*, 196 Mo. App. 544, 196

to cause misapprehension. Confusion seems to have arisen from the broad application of the term of parol evidence rule to several related but distinct topics, especially to the doctrine of estoppel by deed.<sup>74</sup> It was a doctrine of the common law that facts recited in a deed could not be contradicted by the parties to the instrument; though even in jurisdictions where seals still retain much of their early significance, this rule has been considerably broken in upon.<sup>75</sup> But no such broad rule was ever applied to written unsealed contracts.<sup>76</sup> It was part of the doctrine of estoppel by deed that, though the facts recited in the deed could not be contradicted by the parties, they might be contradicted by third persons, "Who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others."<sup>77</sup> At the present day, as recited facts in unsealed writings may generally be shown to be inaccurately stated even between the parties to the writing, there can be no question of the right of third persons to prove the inaccuracy. It is also true in regard to any writing sealed or unsealed that if a transaction is in fraud of the rights of third persons, it may be shown by parol that the written contract is a scheme, or part of a scheme, to defraud them,<sup>78</sup> though in

S. W. 433; *Libby v. Mount Monadnock, etc., Co.*, 67 N. H. 587, 32 Atl. 772; *First Nat. Bank of Plainfield v. Dunn*, 55 N. J. L. 404, 27 Atl. 908; *Lee v. Adsit*, 37 N. Y. 78; *Lowell Mfg. Co. v. Safeguard Ins. Co.*, 88 N. Y. 591; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Alexander v. Richter*, 240 Pa. 22, 26, 87 Atl. 427; *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053; *Ransom v. Wickstrom*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916 A. 588.

<sup>74</sup> As to this doctrine see Bigelow on Estoppel (6th ed.), pp. 364 *et seq.*

<sup>75</sup> See for example *supra*, § 115a.

<sup>76</sup> As to the limits of estoppel by contract, see Bigelow on Estoppel (6th ed.), 695 *et seq.*

<sup>77</sup> 1 Greenleaf, Evidence, § 279. See also *King v. Cheadle*, 3 B. & Adol. 833; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Hubbard v. Harrison*, 38 Ind. 323; *Overseers of New Berlin v. Overseers of Norwich*, 10 Johns. 229; *Bruce v. Roper Lumber Co.*, 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

<sup>78</sup> *Burns v. Thompson*, 91 Ind. 146; *Livingston v. Stevens*, 122 Ia. 62, 94 N. W. 925; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. 852; *National Car, etc., Builder v. Cyclone, etc., Co.*, 49 Minn. 125, 51 N. W. 657. Indeed much of the law of fraudulent conveyances is based on this principle. A conveyance absolute in terms and indefeasible between the parties, whether made orally, by unsealed writing or

an action between the parties the writing might be taken at its face value. Furthermore, it does not follow from the parol evidence rule "that a written contract between A and B, which is conclusive as to them, must be of necessity so, as to the proof of any rights or claims of A against C merely because they grow out of the same business."<sup>79</sup> The effect of the parol evidence rule must also be distinguished from the effect of the requirements of the Statute of Frauds. As has been seen,<sup>80</sup> a memorandum under the statute is not necessarily a written contract, and it may be the oral agreement, not the written memorandum making the contract enforceable, which constitutes the contract. So far as concerns third persons, there is a contract between the parties when the oral agreement is made.<sup>81</sup>

But where the issue in dispute, even between third parties, is what are the obligations of A and B to one another, and those obligations are stated in a written contract, the parol evidence rule is applicable. The written contract represents the truth and the whole truth of the contractual obligations of A and B in whatever way and between whatever parties an inquiry as to such obligations may become important. To admit parol evidence to the contrary which would not be admitted as between the parties, except for the purpose of showing either fraud against the third person, or some invalidating facts which would be available to the parties themselves, is to permit facts to be shown which have no relevancy to the issue of what is the contract between A and B.<sup>82</sup> There can be no doubt that if a third person claims in the right of a party to a written contract,

by deed, may be attacked by creditors if in fraud of their rights.

<sup>79</sup> *Evans v. Wells*, 22 Wend. 324, 345; *Johnson v. Portword*, 89 Tex. 235, 34 S. W. 596, 787.

<sup>80</sup> *Supra*, § 567.

<sup>81</sup> See *supra*, § 530.

<sup>82</sup> In *Walker v. State*, 117 Ala. 42, 23 So. 149, criminal proceedings were brought against the defendant, an agent of the Singer Mfg. Co., for embezzling money of the Company. The defendant set up that money which he had retained was due him for com-

missions and otherwise. The court said, at page 52: "It is obvious, however, that it was not proper for the State to prove by its witness—an agent of the Singer Co.—how much commissions the defendant was entitled to receive on collections. The written contracts regulated that, and were before the court, and there was no question of motive or intent, touching the issues involved in the prosecution, which that witness's views of what the allowable commissions were, would shed any light upon."

he is subject to the parol evidence rule.<sup>83</sup> But the application of the rule to third persons is not confined to such cases. Though most of the decisions on the subject, however broad the language used, are correctly decided since they merely involved either the contradiction of a recited fact, or the proof of fraud against the rights of a third person, a few decisions cannot thus be explained. In some recent cases<sup>84</sup> against joint tort feors, the defence has been set up that a release had been given to the other tort feor. Though perhaps the cases might have been well decided on the ground that the so-called releases when construed as a whole were merely covenants not to sue, the courts did not rest their conclusion on such a construction of the writing taken by itself, but admitted parol evidence of the negotiations between the parties to the release (though conceding that the evidence would not have been admissible between the parties themselves) on the ground that as against a third party the parol evidence rule had no application. The error of such decisions is plain if we assume that the defendant instead of being a joint tort feor was a surety jointly bound on a contract, the principal debtor of which was released or given time—a change which would make no difference in the application of the argument of the court.

In the case supposed, if judgment were given against the surety because a construction was given to the release of the principal, which the writing itself would not bear, the surety would thereafter seek to enforce by subrogation a claim against the principal debtor. He would, however, fail because the right to which he sought subrogation did not exist. As between the creditor and the principal debtor, the release would unquestionably be binding according to the terms of the writing; and as the creditor would have no right against the principal debtor, the surety could be subrogated to nothing.

<sup>83</sup> In *Libby v. Mount Monadnock, etc., Co.*, 67 N. H. 587, 32 Atl. 772, the plaintiff was a garnishee creditor, and was held subject to the terms of a written contract between the defendant and the garnisheed party as fully as if the litigation had been between the parties of the contract. *Union Mach-*

*inery &c. Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

<sup>84</sup> *O'Shea v. New York, etc., R. Co.*, 105 Fed. 559, 44 C. C. A. 601; *Johnson v. Von Scholley*, 218 Mass. 454, 106 N. E. 17; *McKim v. Metropolitan St. Ry. Co. (Mo. App.)*, 196 S. W. 433; *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053.

## CHAPTER XXII

### USAGE AND CUSTOM

Effect of custom and usage.....	648
Distinction between custom and usage.....	649
Proof of usage for purposes of definition.....	650
Usage may be adopted as a term of a contract.....	651
Collateral agreements may be added to written contracts by usage.....	652
Illustrations of collateral agreements annexed to written contracts by usage..	653
Implications of fact or law in a writing may be contradicted more extensively by usage than by parol agreements.....	654
How far law may be changed by custom.....	655
A usage which the parties have indicated an intention not to adopt is ineffec- tive.....	656
Characteristics of usage essential for its validity.....	657
Reasonableness of usage.....	658
Reasonableness of usage—continued.....	659
Generality of usage.....	660
What is necessary to make a party to a contract chargeable with usage.....	661
The province of the court and of the jury.....	662

#### § 648. Effect of custom and usage.

Usage or custom may be important in three different aspects:

- (1) To aid in the interpretation of the meaning of the express language of a contract;
- (2) To annex terms to the contract, and thereby to contradict or vary implications which, otherwise, would be drawn from the written or oral expression of the parties; and
- (3) To create new rules of law.

In the first aspect usage becomes important as a means of interpretation. In the second aspect two questions may be involved, first, does the usage show that the parties have agreed on a collateral term of their contract and, second, if so, does the parol evidence rule prevent their agreement from taking effect? In the third aspect, the usage has ripened into customary law. So far as the first use of evidence of usage is concerned, it may be said broadly, that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning

of the language employed. Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense.<sup>1</sup>

### § 649. Distinction between custom and usage.

The terms, custom and usage, are commonly used interchangeably, though there is a recognized distinction in the meaning of the two words. Custom is such a usage as has by long and uniform practice become the law of the matter to which it relates.<sup>2</sup> Usage derives its efficacy from the assent thereto of parties to the transaction; custom derives its efficacy from its adoption into the law, and when once established is binding irrespective of any manifestation of assent by parties concerned. Usage is, therefore, of importance only in consensual agreements since it is the assent of the parties which gives it its force. Custom, on the other hand, may be of importance in any department of the law. The custom of gavel-kind or of borough English, under which land of a deceased person did not pass to his eldest son as at common law, did not depend for its validity on the assent of the eldest son to be wholly or partly disinherited. The importance of usage except for the purpose of establishing the meaning of words, is comparatively modern. The early law did not give effect to unexpressed implications of fact. The earliest decision of importance recognizing the validity of usage in this respect was decided in the latter half of the eighteenth century by Lord Mansfield.<sup>3</sup> Custom, on the other hand, has from early times been recognized as a source of law, and the customs of different communities in England have been given effect by the courts. In the United States there is less law based on special custom than in England, and this method of developing and changing the law is of decreasing importance. Statutes take its place.

..<sup>1</sup> See *supra*, § 609, and *infra*, § 650.

<sup>2</sup> "Strictly speaking custom is that length of usage which has become law." *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Eames v. H. B. Clafin Co.*, 239 Fed. Rep. 631, 152 C. C. A. 465;

*American Lead Pencil Co. v. Nashville, etc., R. Co.*, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323.

<sup>3</sup> *Wigglesworth v. Dallison*, 1 Doug. 201.

Some confusion of thought has arisen from applying to usages the requirements necessary to establish customary law.

### § 650. Proof of usage for purposes of definition.

Though Professor Thayer has said, that "In contracts, it was always recognized that familiar words may have different meanings in different places, so that 'every bargain as to such a thing shall have relation to the custom of the country where it is made,'" <sup>4</sup> it may be doubted how far it was allowable under early law to show that a word in a written contract (or perhaps in an oral agreement) having a clear and fixed ordinary meaning bore a meaning contrary to its usual significance, if nothing in the context showed that a particular meaning was intended.<sup>5</sup> But there are now numerous decisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest. This is not only true of technical terms,<sup>6</sup> but of language, which at least on its face

<sup>4</sup> Prelim. Treatise on Evidence, p. 403; citing, Keilwey, 87, 3, in the Ex. Ch. in 1505, and continuing: "In *Baker v. Paine*, 1 Ves. p. 456, 459 (1750), Lord Hardwicke, in a mercantile case of sale, remarked: 'all contracts of this kind depend on the usage of trade. . . . On mercantile contracts relating to insurance, etc., courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction.' The development of the mercantile law by the use of special juries involved a recognition of these same ideas."

<sup>5</sup> As late as the end of the eighteenth century in *Yates v. Pym*, 6 Taunt. 446, the words "prime unsinged bacon" were held to have so definite a meaning that parol evidence could not be admitted to show that bacon

with no more than a certain degree of taint came within their meaning. Not only Starkie on Evidence (p. 706) states that "plain and ordinary terms and expressions to which an unequivocal meaning belongs . . . ought not to be altered by evidence of a mercantile understanding and usage" but Stephen, Digest of Evidence, Art. 91 (2) expresses the same idea. "Usage may be admissible to explain what is doubtful: it is never admissible to contradict what is plain." *Blackett v. Royal Exchange Ass. Co.*, 2 Cr. & J. 244, per Lord Lyndhurst, C. B. See also *supra*, § 609.

<sup>6</sup> The general rule is stated in *Soper v. Tyler*, 77 Conn. 104, 106, 58 Atl. 699, "When the defendant made his contract with a Boston grain dealer, the meaning of any technical terms used in expressing it, so far as they were terms of common use in the grain trade at Boston, was to be determined by such usage."





In a contract for the sale of lumber by measure, a particular method of measurement may be shown to be customary.<sup>30</sup> A contract calling for shipment from Turkey to New York has been held satisfied by a cargo shipped from Turkey to Liverpool and transshipped there to New York, that being the customary mode of shipment.<sup>31</sup> "Cash basis, note at sixty days, interest added" may be shown to mean that the buyer has the option of paying either in cash or by note.<sup>32</sup>

**§ 651. Usage may be adopted as a term of a contract.**

The belief of individuals or of a community that a rule of law is something different from what it actually is, will not change the rule of law.<sup>33</sup> Nor will it make any difference if the members of the community habitually settle disputes in accordance with their erroneous belief. At least, a habit must be general and continue for a long time before the common law will adopt the custom as part of itself. But if two individuals of such a community make a contract with one another with reference to a matter to which a well-known habit or usage applies, and if the common law does not forbid the application of the customary rule if parties agree thereto, a different problem is presented. The only question now is whether the parties to the contract have agreed impliedly to be bound by the usage. They cannot change the rule of law but they can change its application to themselves if they agree to do so. The belief of a community that an implied warranty of quality accompanies every sale of goods will not make that the law. But it is the law that if the parties to a sale agree that there shall be a warranty of quality the law enforces their agreement. If then each party to a sale knows that the other believes that there is a warranty impliedly given and assents to its existence, there seems no reason why the implication of fact involved in the existence of the usage should not be given the same effect as any implication of fact in the law of contracts.<sup>34</sup>

<sup>30</sup> *McKinney v. Matthews*, 166 N. C. 576, 82 S. E. 1036; *Brown v. Brooks*, 25 Pa. 210.

<sup>31</sup> *Iasigi v. Rosenstein*, 158 N. Y. 678, 52 N. E. 1124. Cf. *Sutro v. Heilbut*, [1917] 2 K. B. 348.

<sup>32</sup> *Morris v. Supplee*, 208 Pa. 253, 57 Atl. 566.

<sup>33</sup> *Haskins v. Warren*, 115 Mass. 514.

<sup>34</sup> See *Eames v. H. B. Claffin Co.*, 239 Fed. 631, 152 C. C. A. 465.

Broad statements, therefore, which are sometimes made, that usage or custom cannot change a rule of law,<sup>35</sup> must be accepted with some reservation. The rule of law cannot be changed, but its application to the case may be prevented. The facts as they appear to be apart from the usage are altered by the additional agreement which is implied because the parties contracted with reference to the usage. The additional facts make a rule of law applicable which would not have been applicable in the absence of the usage. Otherwise it would have been idle to introduce evidence of it. Indeed the very existence or non-existence of a contract may depend upon usage. Thus usage in a particular trade that one party should confirm in writing telephone agreements, and the other should promptly give notice if the written confirmation proved inaccurate has been rightly held admissible.<sup>36</sup> It is evident that under this usage a contract made by telephone may by lack of confirmation be invalidated, and a disagreement by telephone may by failure to object to the written confirmation ripen into a contract.

**§ 652. Collateral agreements may be added to written contracts by usage.**

In accordance with the principles heretofore considered, in connection with collateral parol agreements, it may be shown that a matter concerning which the written contract is silent, is affected by a usage with which both parties are chargeable.

“It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to

<sup>35</sup> *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457, 64 N. E. 496; *Entwhistle v. Henke*, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196; *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. 901; *High Wheel Auto Parts Co. v. Journal Co.*, 50 Ind. App. 396, 98 N. E. 442; *Clark v. Allaman*, 71 Kans. 206, 80 Pac. 571, 70 L. R. A. 971; *Grant v. Robb*, 71 Kans. 846, 80 Pac. 585;

*Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081; *Healey v. Mannheimer*, 74 Minn. 240, 76 N. W. 1126; *Hart v. Cort*, 165 App. Div. 583, 151 N. Y. S. 4; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122. Thus a custom that freight prepaid is not to be returned in case the vessel is lost, has been held ineffective. *De Sola v. Pomares*, 119 Fed. 373.

<sup>36</sup> *Strong v. Ringle*, 96 Kans. 573, 152 Pac. 631.

which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."<sup>37</sup> This necessarily involves the proposition that evidence of usage may be introduced to contradict implications of fact or law which in the absence of usage would have been drawn from the writing, since otherwise there would be no point in proving the usage.<sup>38</sup> The matter has been confused by statements, often inconsistent, made by courts of high authority. Thus Clifford, J., of the Supreme Court of the United States, speaking for the court has said: "Usage is admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties,"<sup>39</sup> and the statement is typical of the endeavor of many courts to give in practice to usage a greater effect than they admit in theory. In fact, the statement is self-contradictory. The distinction between "annexing incidents" and "adding a new element" is impossible to draw. Usage when not admitted merely for the purposes of defining the meaning of language is necessarily introduced for the purpose of adding a new element or term or incident, whichever one is pleased to call it, to the contract.<sup>40</sup>

<sup>37</sup> *Hutton v. Warren*, 1 M. & W. 466, 475, per Parke, B. So "Evidence of a custom can be given in two cases: (1) to interpret a business term or expression in a contract, and (2) to annex an incident to the contract." *Sutro v. Heilbut*, [1917] 2 K. B. 348, 365. "Usage enters into every contract, and may be shown for the purpose not only of elucidating the contract, but also of completing it." *Bitulithic Co. v. Algiers Ry. & Lighting Co.*, 130 La. 830, 58 So. 588. See also *Produce Brokers' Co. v. Olympia Oil and Cake Co.*, [1916] A. C. 314, 331.

<sup>38</sup> The implication contradicted may be merely negative, *i. e.*, that the parties had made no agreement in regard to the matter to which the custom related.

<sup>39</sup> *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779. Equally futile is the distinction suggested in *Scott's Exec. v. Chesterton*, 117 Va. 584, 596, 85 S. E. 502, that "a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character."

<sup>40</sup> The matter has been well expressed in *Humfrey v. Dale*, 7 E. & B. 266, E.







A right of the buyer to inspect goods before paying for them though bought under a contract which apart from the usage would be held to exclude such a right may also be established by usage.<sup>64</sup>

One who employs an agent to deal for him in a certain market, thereby consents to having the business transacted according to the usages of that market even though not aware of the nature of such usages.<sup>65</sup> Other illustrations of the addition of collateral agreements annexed by usage to contracts may easily be found.<sup>66</sup>

**§ 654. Implications of fact or law in a writing may be contradicted more extensively by usage than by parol agreements.**

Though the principle under which incidents are annexed to written contracts by usage is the same as that which controls the admission of collateral parol agreements, usage may be more effective than an express agreement. The test is probably, as has been suggested, the practical one whether a reasonable contracting party might fairly be supposed to have entered into the written contract in question and have intended to be bound both by its express terms, and also by the terms of the usage or collateral parol agreement in question. Concrete cases seem to indicate that reasonable persons may with far greater probability rely on a recognized usage to affect the otherwise natural implications of their written contracts than on collateral parol agreements. By usage a tenant has been held entitled to hold over part of leased premises after expiration of the notice to quit for which the lease provided.<sup>67</sup> A signature "as agent to merchants" which the court admitted

<sup>64</sup> *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

<sup>65</sup> *Sutton v. Tatham*, 10 A. & E. 27; *Smith v. Reynolds*, 66 L. T. 808; *Forget v. Baxter*, [1900] A. C. 467, 479; *Partridge v. Cutler*, 168 Ill. 504, 48 N. E. 125.

<sup>66</sup> See, e. g., *Arkansas, etc., R. Co. v. Premier Cotton Mills*, 109 Ark. 218, 158 S. W. 148; *Barrie v. Quinby*, 206

Mass. 259, 92 N. E. 451; *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828; and see cases in the following sections. Cf. *Finch v. Zenith Furnace Co.*, 146 Ill. App. 257, affd., 245 Ill. 586, 92 N. E. 521; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579.

<sup>67</sup> *Re Paul*, 24 Q. B. D. 247.

would not have bound the agent personally, has been held to bind him under a usage which made an agent liable who failed to disclose his principal.<sup>68</sup>

Where a bill of lading made goods deliverable on payment of freight of "5/8 of a penny per pound, with 5% primage, and average accustomed," a usage by which three months' discount was deducted from bill of lading freight of goods coming from the port of shipment was held ineffectual;<sup>69</sup> but a usage of the stock exchange relieving a jobber who has contracted to buy shares, from liability, if he gives the seller the name of another who will assume the contract and no objection to the nominee is made by the seller within ten days has been upheld.<sup>70</sup> Where an agreement was made for the payment of \$12 an acre for clearing twenty miles of a right of way, a usage was given effect to pay for clearing so much of the right of way as extended through open fields, only that proportion of the price which such work bore to the work necessary to clear an equal space in the forest.<sup>71</sup>

Usage may make a buyer bound to pay divisibly for instalments of the seller's performance, though apart from the usage no payment would be due until the seller had completely performed;<sup>72</sup> and may give the buyer a right to inspect the goods before paying a draft for the price, though apart from custom he would have no such right.<sup>73</sup> A usage of pawnbrokers to sell unredeemed pledges after the expiration of six months has been enforced against a pledgor though the rule of the common law gives no such right.<sup>74</sup>

A contract to pay money has been shown by usage to be satisfied by payment by check.<sup>75</sup>

It may be questioned whether the effect produced by usage in these cases could have been produced by a collateral parol

<sup>68</sup> *Hutchinson v. Tatham*, L. R. 8 C. P. 482.

<sup>69</sup> *Brown v. Byrne*, 3 E. & B. 703.

<sup>70</sup> *Grissell v. Bristowe*, L. R. 4 C. P. 36. See also *Maxted v. Paine*, L. R. 6 Exch. 132. Cf. *Nickalls v. Merry*, L. R. 7 H. L. 530.

<sup>71</sup> *McCarthy v. McArthur*, 69 Ark. 313, 63 S. W. 56.

<sup>72</sup> *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Stern v. Simons*, 77 Conn. 150, 58 Atl. 696.

<sup>75</sup> *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586.

agreement. Had there been no usage the natural implications of the writing would have been too strong.<sup>76</sup>

### § 655. How far law may be changed by custom.

Though usage may work such changes in the rule of law applicable to a situation, as the parties themselves might have brought about had they in terms so agreed, it is a general rule that "where the incident [which it is sought to annex by proof of usage] is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage."<sup>77</sup> This means that if an express agreement would be either in violation of public policy or forbidden effect by law, an equivalent usage will not help the matter. Parties cannot effectively agree that a parol promise shall be binding without consideration, and the fact that a community or group of persons is accustomed to act as if such promises were binding will make no difference. So where a Factor's Act gives power to a mercantile agent to pledge the goods of his principal, a usage denying such power and invalidating such a pledge is ineffective.<sup>78</sup> And where the law does not permit one party to a contract within the Statute of Frauds to sign a memorandum as agent for the other, even if authorized to do so,<sup>79</sup> a usage permitting such agency is ineffective.<sup>80</sup> But even this principle may have its exceptions. The rules of law governing negotiable instruments are based on the custom of merchants and are often not only different from, but contradictory to the rules governing other contracts. Choses in action cannot be made negotiable by express stipulation. Yet custom has made some choses in action negotiable, and may apparently have the same power still to make others negotiable.<sup>81</sup> The

<sup>76</sup> See also cases in the preceding section, of many of which the same might be said.

<sup>77</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, 386; *Northwestern Nat. Ins. Co. v. Southern States Phosphate &c. Co.*, 20 Ga. App. 506, 93 S. E. 157; *Myers v. Exchange Nat. Bank*, 96 Wash. 244, 164 Pac. 951.

<sup>78</sup> *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221.

<sup>79</sup> See *supra*, § 587.

<sup>80</sup> *Happ Bros. Co. v. Hunter Mfg. &c. Co.*, 145 Ga. 836, 90 S. E. 61.

<sup>81</sup> Though this is denied in *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, 386, that case is overruled by later decisions, holding that bonds by

effect of the transfer of order bills of lading,<sup>82</sup> and more recently of warehouse receipts giving the transferee not only title, but in effect possession of the property,<sup>83</sup> is another illustration of a change in the law owing to mercantile custom, though express stipulation that something which the law does not regard as possession shall be so regarded, would ordinarily be ineffective. A converse case arises in England, where it is held that because of the usage of selling goods to hotel-keepers on conditional sale with retention of title, the goods are not in the order and disposition of the hotel-keeper within the bankrupt law.<sup>84</sup> So the custom of market overt in England is contradictory to the general rule of the common law applicable to sale of goods. In truth usage is one of the agencies by which the law has been gradually formed and still is not only added to, but otherwise amended. The change, however, when other than a merely additional rule as distinguished from one contradicting a previously settled principle is gradual, especially in recent times, and not always frankly admitted when first made. That usage may harden by repeated decisions into such new rules of law as do not contradict any previously existing rule is, however, clearly stated.<sup>85</sup>

**§ 656. A usage which the parties have indicated an intention not to adopt is ineffective.**

Though a usage may show that the effect of a written contract is different from an apparently clear meaning which the writing would otherwise bear, it is obvious that if the parties

modern custom may be made negotiable. *Goodwin v. Roberts*, L. R. 10 Ex. 337, 356; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *Bechuanaland Co. v. London Trading Bank Co.*, [1898] 2 Q. B. 658; *Edelstein v. Schuler*, [1902] 2 K. B. 144.

<sup>82</sup> *Lickbarrow v. Mason*, 2 T. R. 63, 1 H. Bl. 357, 2 *id.* 211, 6 East, 20 n. 5 T. R. 683. See Buller's general remarks, 2 Y. R. 63, 73.

<sup>83</sup> See *Merchants' Banking Co. v. Phoenix, etc., Steel Co.*, 5 Ch. D. 205;

*Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

<sup>84</sup> *In re Blanshard*, 8 Ch. D. 601; *Ex parte Brooks*, 23 Ch. D. 261.

<sup>85</sup> "There is no doubt that a mercantile custom may be so frequently proved in courts of common law, that the courts will take judicial notice of it, and it becomes part of the law merchant," per Mellish, L. J., in *Ex parte Powell*, 1 Ch. D. 501, 506. See also *Universo Insurance Co. v. Merchants' Marine Ins. Co.*, [1897] 1 Q. B. 205, 2 *id.* 93.





**§ 658. Reasonableness of usage.**

One quality which it is universally stated that usage must possess in order to be effectual is reasonableness. This rule was originally laid down in regard to custom—that is customary law, which is applicable to a neighborhood irrespective of its being adopted as part of a contract.<sup>90</sup> It is obvious that such a requirement is there appropriate. The common law cannot adopt as one of its rules a custom which is not reasonable in its nature. With regard to usage, however, the question is different. Parties may make an unreasonable contract if it is not so unreasonable as to be illegal or in violation of public policy. If they may make an unreasonable contract in express terms, there seems no reason why they should not make one equally unreasonable by implication of fact. It is true that the more unreasonable the terms of the alleged implication are, the clearer proof will the court require that parties assented to the unreasonable terms, and the less ready will the court be to assume knowledge or a duty to know, in the absence of clear evidence of actual knowledge and adoption of the usage. “There can be very few cases, where a custom has been sufficiently proved, in which a court could hold that it was unreasonable, for that it must be convenient is shewn by the fact that it has been established and followed.”<sup>91</sup>

**§ 659. Reasonableness of usage—continued.**

Though, as just shown, there seems force in the argument that where a usage is adopted as part of a contract by apparent assent thereto, the law should impose no more stringent requirement of reasonableness than it does where express terms of a contract are in question, there seems no doubt that a more rigorous test is in fact imposed. The reason is probably because the assent to a usage which is given by parties to a contract is generally constructive. An outward manifestation of assent to the express terms of a contract almost invariably connotes mental assent. Contracting under circumstances which make a usage applicable less certainly connotes an actual purpose to adopt the usage as a term of the contract.

<sup>90</sup> 1 Bl. Comm. 77, referring to Co. Litt. § 212; 1 Inst. 62.

<sup>91</sup> *Moult v. Halliday*, [1898] 1 Q. B. 125, 130.

The test of reasonableness is necessarily somewhat indefinite. Even an express contract must not be opposed to public policy, and *a fortiori*, a usage must not be. Where a usage is actually known to the contracting parties, and the court can feel confident that they intended to adopt it, it is probable that the requirement of reasonableness means little more than that the usage must not be so opposed to public policy that if the parties had expressly stated it as part of their contract, the law would not have enforced it. Reasonableness, therefore, may in some degree depend upon the actual knowledge of the parties. A usage that an outgoing tenant under a lease shall be paid for straw left on the farm, has been upheld,<sup>92</sup> but a usage which makes the incoming tenant liable to the outgoing tenant, while the landlord is under no liability to him, has been denied enforcement because it is unreasonable.<sup>93</sup> A usage that a broker employed to buy 50 tons of tallow, might buy on behalf of this and other customers a larger amount, and subsequently appropriate 50 tons to the customer, was also held bad;<sup>94</sup> as were a usage permitting a buyer to reject at his option a portion of a shipment of goods ordered by him;<sup>95</sup> a usage of brokers to charge commissions to both parties;<sup>96</sup> and one requiring a consignor to allow whatever shortage in a shipment was stated to exist by the consignee.<sup>97</sup>

It is impossible to lay down a general rule covering all cases. The decisions of particular courts as to what customs are unreasonable will necessarily depend upon all the circumstances of the situation including perhaps the views of the court on economic questions.<sup>98</sup>

<sup>92</sup> *Muncey v. Dennis*, 1 H. & N. 216.

<sup>93</sup> *Bradburn v. Foley*, 3 C. P. D. 129.

<sup>94</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802. Cf. *Scott v. Godfrey*, [1901] 2 K. B. 726, where a somewhat similar usage of stock brokers was upheld.

<sup>95</sup> *Kalamazoo Corset Co. v. Simon*, 129 Fed. 144, 1005, 64 C. C. A. 166; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122.

<sup>96</sup> *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756.

<sup>97</sup> *Byrd v. Beall*, 150 Ala. 122, 43 So. 749.

<sup>98</sup> See *Phillips v. Briand*, 1 H. & N. 21; *Stewart v. West India Co.*, L. R. 8 Q. B. 88, 362; *Barrow v. Dyster*, 13 Q. B. D. 635; *Macoun v. Erskine*, [1901] 2 K. B. 493; *Liverpool & G. W. Steam Co. v. Sutter*, 17 Fed. 695; *Young v. One Hundred and Forty Thousand Hard Brick*, 78 Fed. 149; *Municipal Inv. Co. v. Industrial Trust Co.*, 89 Fed. 254; *Chilberg v. Lyng*, 128 Fed. 899, 63 C. C. A. 451; *Anderson v. Whittaker*, 97 Ala. 690, 11 So. 919; *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Becker v. Hall*, 116 Ia.

### § 660. Generality of usage.

It is sometimes asserted that usage must be general in order to be effectual; but even custom, as distinguished from usage, might be local, and still binding;<sup>99</sup> and it seems clear that usage likewise may be. The real question where usage is concerned is whether the parties contracted with reference thereto. This will depend not merely on actually expressed assent to the adoption of the usage but on the justifiable belief of each party that the other was adopting it. A habit of business confined to the two parties to a contract may by implication be adopted as an unexpressed part of it. The habit indeed of one party, known and apparently acquiesced in by the other, may prove the adoption of an implied term of the contract between them.<sup>1</sup>

Consequently the generality of habit or usage is important only with reference to the inference properly to be drawn of the parties' knowledge or ignorance of its existence. The more general and notorious a usage is, the more clearly will either party to a contract be justified in assuming that the other is contracting with reference to the usage.

### § 661. What is necessary to make a party to a contract chargeable with usage.

A party cannot be bound by usage unless he either knew or ought to have known of its existence and nature. Accordingly one who seeks either to define language or to annex a term to a contract by means of usage must either show that the other

589, 88 N. W. 324, 56 L. R. A. 573; *Castleman v. Southern Mut. Life Ins. Co.*, 14 Bush, 197; *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545; *The Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123; *Schipper v. Milton*, 51 N. Y. App. Div. 522, 64 N. Y. S. 935; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850; *Dempsey v. Dobson*, 184 Pa. 588, 39 Atl. 493, 40 L. R. A. 550, 63 Am. St. Rep. 809; *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644; *Saunders v. Southern Pac. Co.*, 15 Utah, 334, 49 Pac. 646; *Russell's Ex'r v. Ferguson*, 77 Vt. 433, 60 Atl. 802.

<sup>99</sup> 1 Bl. Comm. 76.

<sup>1</sup> In *Birely & Sons v. Dodson*, 107 Md. 229, 235, 68 Atl. 488, the court said: "Where such usage is receivable at all, it may be either of a general usage in that trade or business or in the uniform course of dealing of the party against whom the usage is invoked in his transactions with the other party; the acts and admissions of the parties in the one case, and the general custom of the business in the other being held to enter into the particular contract. *Citizens Fire Ins. Co. v. Doll*, 35 Md. 89, 107; *Mitchell v. Wedderburn*, 68 Md. 139, 145."



It is generally said that the usage must have existed for a considerable length of time. This supposed requirement relates rather to custom, and what is necessary to give custom the force of law,<sup>6</sup> than to usage which derives its efficacy, from the assent of the parties to the contract. The essential matter there is that the usage shall have been at the time of the contract so notorious as to justify belief that the parties contracted with reference to it. And if it can be proved that the parties in fact knew of the usage it is immaterial for how brief a time it existed.<sup>7</sup> The degree of proof that is necessary to satisfy a court that a particular usage existed, and that the contract must be interpreted with reference to it, may indeed vary according to the generality of the usage and the length of time which it has been in existence. "When once it is admitted that there is a custom, it becomes clear that the custom must have grown up, and it follows that the custom may change, and a new custom may become notorious, so as to be incorporated into every contract, unless it is expressly excluded. Then there comes a further stage, where the custom need no longer be proved, but the Courts will take judicial notice of it."<sup>8</sup> Where usage is general it is ordinarily a fair assumption that parties who contract under circumstances to which the usage is applicable either have or ought to have knowledge of it; but where a usage is local, no such implication necessarily arises. It must appear either that the usage was actually known or be inferable as a fact from residence or business transactions in the locality where it prevails that the party to the contract setting up the usage was justified in assuming knowledge of it by the other party.<sup>9</sup> So even though a usage is general in a particular business, one who is not in that business will not

<sup>6</sup> 1 Bl. Comm. 76.

<sup>7</sup> *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612.

<sup>8</sup> *Moult v. Halliday*, [1898] 1 Q. B. 125, 130.

<sup>9</sup> *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Bacon Fruit Co. v. Blessing*, 122 Ga. 369, 50 S. E. 139; *Rake v. Townsend* (Ia.), 102 N. W. 499; *Kenyon v. Charlevoix Im-*

*provement Co.*, 135 Mich. 103, 97 N. W. 407; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631; *Leach v. Hughes*, 74 N. Y. Misc. 69, 131 N. Y. S. 570; *Gilmer v. Young*, 122 N. C. 806, 29 S. E. 830; *Robbins v. Maher*, 14 N. Dak. 228, 103 N. W. 755. Cf. *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.



## CHAPTER XXIII

### EXPRESS CONDITIONS

Nature of conditions . . . . .	663
Purpose of conditions . . . . .	664
Distinction between promises and conditions . . . . .	665
What it is which conditions qualify . . . . .	666
Precedent and concurrent conditions . . . . .	666a
Conditions subsequent . . . . .	667
Express and implied conditions . . . . .	668
Importance of distinguishing between express and implied conditions . . . . .	669
Words necessary to create a promise . . . . .	670
Words necessary to create a condition . . . . .	671
Aid to interpretation from considering which party uses language . . . . .	672
Warranties and conditions . . . . .	673
Pleading in actions on conditional contracts . . . . .	674
Generally conditions must be exactly complied with . . . . .	675

#### § 663. Nature of conditions.

A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen. It is ordinarily said that a condition must be something future and uncertain, and it is undoubtedly true that at least from the standpoint of the parties, both futurity and uncertainty are necessary elements. If to their knowledge the event has either already happened or cannot possibly happen, the promise is either absolute or nugatory from the outset. It may be said that this is true whether the parties are aware of the facts or not, and such a statement is strictly accurate. A promise to pay for a horse if he is sound, could only be regarded by an omniscient person as either no promise or as an absolute promise, according as the horse was at the time of the bargain in fact sound or unsound. But the parties to such a transaction undoubtedly look at it as involving a promise subject to a condition, because their knowledge of the horse's condition will not be complete until the future, and the common law accepts that point of view.

The situation suggested of a promise qualified by the

happening of an event which is neither future nor uncertain, may seem unlikely, but in fact it is of frequent occurrence in insurance law. If the matter in question though it has happened is unknown to both parties, there can be no doubt that the matter may be made a condition of a promise which will be treated in law in the same way as if it were future and uncertain. Thus a ship already lost may be insured.<sup>1</sup> The insurer's promise though in reality absolute if the vessel has already been lost, is treated as conditional; whereas, if the vessel has not been lost and has perhaps already, unknown to the parties completed her voyage, the insurer is in reality promising nothing, but as the bargain was made on the basis of the knowledge which the parties had at the time they made their agreement, there is no failure of consideration. If the insurer's promise were in law a nullity, because in view of the condition on which it was dependent no possible liability could arise upon it, fraud of the insured would be unnecessary to establish a defence to an action for the insurance money, or to establish a right to recover it back if already paid. Lack or failure of consideration would be sufficient without fraud. In truth, however, the promise is not legally a nullity, and the transaction can be avoided by the insured only on the ground of mutual mistake or of fraud. If the parties contemplate the possibility of the situation which has arisen, their agreement is a valid contract. Even though one party knows of the fact which is stated as a condition of the promise, the contract may still be valid and treated by the law as a conditional contract. Where the insured is aware that he has already violated a condition of an insurer's promise, as where he makes a knowingly false and material representation, and the truth of the representation is a condition of the policy, there is no failure of consideration, and the premium can be retained though the breach of condition excuses the insurer from liability.<sup>2</sup> If, however, the parties mistakenly assumed the existence of a fact upon which the promise of the insurer was in terms con-

<sup>1</sup> *Sutherland v. Pratt*, 11 M. & W. 312; *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827; *Arnould, Marine Ins.*, § 13.

<sup>2</sup> *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485; and see *infra*, §§ 754 *et seq.*

ditioned, or if though the insured was aware of the facts yet his conduct was not intentionally fraudulent, there is failure of consideration; the premium has not been earned and if paid may be recovered.<sup>3</sup> In exact pleading also whether the defendant should deny the existence of a contract, or admit the contract and deny the breach of it, will depend on whether the law accepts the point of view of the parties and treats a matter unknown to the parties though it has already happened as capable of being a condition.<sup>4</sup>

#### § 664. Purpose of conditions.

It is more advantageous for a promisee to have an absolute promise than a conditional one. The terms of the promise apart from any conditions qualifying it are for the promisee's benefit. The conditions are inserted for the promisor's protection. If the promisor desires to receive some performance from the promisee in return for his own, he may attempt to secure his object either by requiring a counter promise of such performance, or by qualifying his own promise by making it conditional on the desired performance being previously or concurrently given by the promisee. The fullest protection for the promisor will be obtained if he unites these two methods, requiring a counter promise and also making his own promise conditional on the performance of that counter promise.

#### § 665. Distinction between promises and conditions.

The distinction between a promise or covenant on the one hand, and a condition on the other, both in their legal effect and in their wording, is obvious and familiar. Breach of promise subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Breach of condition prevents the party failing to perform from acquiring a right, or deprives him of one, but subjects him to no

<sup>3</sup> *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485; and see *infra*, §§ 754 *et seq.*

<sup>4</sup> In *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479, the defendant promised to buy certain notes from the plaintiff if the plaintiff had paid \$75 for them

as he asserted. The court called the transaction a "conditional" agreement and discusses the matter in a way equally applicable to a promise dependent on a fortuitous and uncertain event. See *supra*, § 119.























































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































































paid in advance. This has been held in England upon the shipper the risk of the voyage to that effect; therefore if the goods are lost without fault on the part of the carrier, after the day when the partial payment or was due, the advanced freight if paid may, nevertheless be retained;<sup>37</sup> and if unpaid may be recovered by the shipper. In the United States, however, it is recognized that though paid or promised in advance, freight is the consideration in exchange for carrying goods, and if they are not carried for whatever cause, there is a failure of consideration and the recovery of any payment made, and the refusal to make any advance promised but not made,<sup>38</sup> unless the contract provides in effect that the payment is made in consideration of the chance of the goods being safely carried.<sup>39</sup>

If the contract of carriage is repudiated,<sup>40</sup> or if the goods are destroyed before reaching their destination, no portion of the agreed freight can be recovered.<sup>41</sup> If goods are safely discharged before the port of destination is reached, there can be no recovery of such a portion, unless the owner makes a new contract to pay freight, though the cause for the ship's failure to reach its destination was an excepted peril.<sup>42</sup> It seems to be assumed that

<sup>37</sup> *DeSilvale v. Kendall*, 4 M. & S. 37; *Saunders v. Drew*, 3 B. & Adol. 445; *Byrne v. Schiller*, L. R. 6 Exch. 319; *Allison v. Bristol Ins. Co.*, 1 A. C. 209, 226.

<sup>38</sup> *Oriental S. S. Co. v. Tylor*, [1893] 2 Q. B. 518; *Weir v. Girvin*, [1900] 1 Q. B. 45; *Coker v. Limerick S. S. Co.*, 34 Times L. R. 296 (House of Lords).

<sup>39</sup> *The Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149; *Pitman v. Hooper*, 3 Sumner, 50; *Burn Line, Ltd. v. Steamship Co.*, 162 Fed. 298, 89 C. C. A. 278; *National &c. Co. v. International Paper Co.*, 241 Fed. 861, 862, 154 C. C. A. 563; *Reina v. Cross*, 6 Cal. 29; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Phelps v. Williamson*, 5 Sandf. (N. Y.) 578..

See also *Porter v. Tull*, 6 Wheat. 965, 22 L. R. A. 613, 10 Rep. 172.

<sup>40</sup> *National Steam Nav. Co. v. International Paper Co.*, 241 Fed. 861, 154 C. C. A. 563, and see *supra*, note 39.

<sup>41</sup> *Newsum v. Bradley*, [1893] 1 B. 271.

<sup>42</sup> *British, etc., Ins. Co. v. Pacific Co.*, 72 Fed. 285, 18 C. C. A. 561, 38 U. S. App. 243.

<sup>43</sup> *Liddard v. Lopes*, [1909] 1 Q. B. 526; *Metcalf v. Britannia Co.*, 1 Q. B. D. 613; *St. Enoch Co. v. Phosphate Mining Co.*, 1 K. B. 624; *The Columbian Co. v. Catlett*, 12 Wheat. 383, 6 L. R. A. 19, 19 L. Ed. 406; *Merchants' Co. v. Butler*, 20 Md. 41; *R. v. Young*, 38 Pa. St. 169.

owner of the cargo voluntarily accepts the goods or agrees to pay freight when his goods are delivered at some point short of their destination, a contract is formed upon which he will be liable.<sup>43</sup> But the hypothesis is that the shipowner is justified in not carrying the goods to their destination, and unless the delivery of the goods was requested by the owner of the cargo at one port rather than at another possible point, it is difficult to find valid consideration to support a promise. He has an absolute right to the delivery of his goods, and giving him what he is entitled to have without payment cannot support a promise.<sup>44</sup> It is difficult to make out a contract unless some other choice is offered the owner of the goods than the alternative of accepting his goods at the intermediate port or going without them altogether. On the other hand, it seems clear on principle that there should be quasi-contractual liability measured by the benefit which the owner of the cargo derives from the partial transportation, and that this obligation should arise in spite of his wishes to the contrary.<sup>45</sup>

#### § 1102. Effect of breach of promise in a charter party.

The effect of a failure of one party or the other to keep his promise in a charter-party is to be determined according to the general principles governing the law of contracts. Damages commensurate with the breach are of course recoverable; and if the breach is sufficiently material, further performance by the injured party will be excused. Part performance on either side will involve the consequence that a more serious breach than might otherwise be necessary to excuse further performance will be required. Unless the breach can fairly be regarded as material in view of all

<sup>43</sup> In *Metcalf v. Britannia Iron-works Co.*, 2 Q. B. D. 423, 426, Lord Coleridge summarizing the opinion of Parke, B., in *Vlierboom v. Chapman*, 13 M. & W. 230, 238, said: "To justify a claim for pro rata freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was in-

tentionally dispensed with. That must mean 'dispensed with by some one who had authority from the original consignor.' "

<sup>44</sup> See *supra*, § 130.

<sup>45</sup> See *infra*, § 1973, in regard to the rights of parties where complete performance is prevented by excusable impossibility; and other analogous cases are referred to, *supra*, § 1479.

the circumstances, failure of one party to perform will excuse the other.<sup>46</sup> If the breach frustrates the object of the contract the injured party will be excused even though the breach was due to no fault, and under the terms of the contract the party gives rise to no liability.<sup>47</sup> Where the obligation imposed by the charter is simply to exercise reasonable diligence and it is obvious that if performance is prevented by unforeseen difficulties, no liability may arise.<sup>48</sup>

### § 1103. When an excepted peril discharges a contract entered into

The effect of an excepted peril may be merely to modify the contract.

<sup>46</sup> *Freeman v. Taylor*, 8 Bing. 124; *MacAndrew v. Chapple*, L. R. 1 C. P. 643, and see cases in the following note.

<sup>47</sup> *Hudson v. Hill*, 43 L. J. C. P. 273. In *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. 663, 666, the court said: "Where there is no express stipulation in a charter party as to time, the law implies a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, or, if it has been commenced, in the performance of it; and if the purposes of the charter party were altogether frustrated by the delay it is a defence to an action for nonperformance by the charterers. *Olsen v. Hunter-Benn & Co.* (D. C.), 54 Fed. 530."

In *Thebideau v. Cairns*, 171 Fed. 233, 236, the court said: "The implied requirement was that she should proceed there with reasonable dispatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, unless the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract."

In *Schooner Mahukona Co. v. Charles Nelson Co.*, 142 Fed. 615, 616, the court said: "Nor do I think such contract was dissolved, as contended by defendant, by reason of the fact

that the *Mahukona* was 60 days late when she reached Everett port where she was to receive her cargo. This long delay did not put an end to the contract, as it did not defeat the object for which the vessel had been chartered." See also §§ 842 *et seq.*

<sup>48</sup> In *Schooner Mahukona Co. v. Charles Nelson Co.*, 142 Fed. 615, the court said: "It is conceded that the late arrival of the *Mahukona* at the port where she was to take her cargo was caused by storms and adverse winds, and was not due to fault upon the part of the vessel or her navigation. This being so, it seems to be well settled that the vessel is not responsible for the damage to the cargo. The defendant may have sustained the loss by reason of her tardy arrival. The charter party did not fix any time within which she was to arrive to receive her cargo. The obligation of the ship, therefore, was to make reasonable efforts to enter as speedily as practicable upon the performance of the voyage named in the charter; having made such efforts, the vessel's owner is not responsible for any loss sustained by the charterer, by reason of the fact that without fault on the part of her owner or crew the vessel was delayed by storms and adverse winds in reaching the port where she was to receive her cargo."

future performance of the contract or to excuse it altogether. If the peril does not totally or permanently prevent performance, it may happen either that the owner of the goods asserts a right to determine the contract or that the carrier asserts such a right. Express provisions in the contract may settle such disputes, but in the absence of such provisions,<sup>49</sup> the materiality of the failure to fulfil the contract caused by the excepted peril must furnish the test. If continuance of performance will throw a heavy and unanticipated burden on the carrier, it need not perform.<sup>50</sup> If the object of the contract will be frustrated from the standpoint of the shipper

<sup>49</sup> In *Brown v. Turner*, [1912] A. C. 12 the Court of Appeal had held under a provision in a time charter party providing that "the owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented" by (among other things), strikes, that the charterers must pay the charter hire though a strike prevented them from loading a cargo of coal at a port to which they had ordered the vessel to proceed. The House of Lords affirmed the decision but Lord Shaw said: "I may say, my Lords, that I do not see my way in terms to agree with the view which has been reached by the Court of Appeal on the construction of the words 'mutually absolved,' which occur in this contract. It does not appear to me to be sound to say that the liability of the charterers was merely to pay rent, and that, as the strike had not prevented them doing that, therefore the absolving clause does not apply. I think that a strike with its consequence of preventing the use of the vessel as a carrier (which is indeed the sole or main consequence which the parties must have had in view) was an occasion when on the one hand the charterer might not be able to use his vessel, and on the other the owner should not be entitled to his rent, and in my opinion

the term 'mutually absolved' ought to be construed so as to meet this case and as covering the liabilities on both sides of a mutual or reciprocal character.

"But on the other hand, my Lords, I think the same result as that arrived at by the Court of Appeal is reached by reason of the fact that the charterers were not in fact prevented by the strike from the use of the vessel during the period in question, but themselves chose, as I have explained, to keep it lying in the strike area."

<sup>50</sup> *The Progreso*, 50 Fed. 835. "A vessel, having by charter agreed to be at a certain port by the 1st of October, 'restraint of princes, rulers, and people excepted,' and having been prevented from going there during October by quarantine regulations at such port, was held bound to have been at the port on the 1st of November, when she knew the quarantine would be raised." *Karran v. Peabody*, 145 Fed. 166, 76 C. C. A. 136. "A general provision in a charter party, excepting 'all and every the dangers and accidents of the seas,' has no application to a prior specific provision giving the charterers the right to cancel should the vessel not arrive in good order at the port of loading on or before a specified date, so as to extend such date in case arrival is delayed by sea perils."

even though in the future, the performance is accurately carried out, he is excused.<sup>51</sup>

Sometimes the contract contains an express power to the charterer to cancel the charter party in case of delay beyond a specified day, or for other cause. The charterer cannot be compelled before the happening of the contingency to say whether he will exercise the power or not. The right to judge at the ultimate day whether it is desirable to do so is his contractual privilege.<sup>52</sup>

#### § 1104. When a common carrier's liabilities for goods begin and end.

As the liability of a common carrier is more stringent than that of an ordinary bailee for hire, it is important to determine at what moment a carrier becomes liable as such, and for how long his liability continues. He becomes liable as such as soon as goods are delivered to him for immediate transportation;<sup>53</sup> and this is true though the goods are placed in a freight warehouse because no car is available, provided shipment is to be made as soon as possible.<sup>54</sup> In order to bind the carrier, delivery must be made to some one authorized to receive the goods, unless by custom the carrier has allowed the public to leave them at a particular place of deposit when no employee of the carrier was there to receive them.<sup>55</sup>

<sup>51</sup> *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125; *Tully v. Howling*, 2 Q. B. D. 182; *Assicurazioni Generali v. Steamship, etc., Co.*, [1892] 1 Q. B. 571, 577; *Porteous v. Williams*, 115 N. Y. 116, 21 N. E. 711.

<sup>52</sup> *Karran v. Peabody*, 145 Fed. 166, 76 C. C. A. 136. "A charterer, given the right by the charter party to cancel in case vessel does not arrive at the loading port by a specified date, is not required to exercise his option until her arrival, and his right to cancel is not lost by his refusal to state his election on request of the owners, after such date had passed, and when the vessel was in a distant port, and the time when she would arrive was unknown."

<sup>53</sup> *Boehm v. Combe*, 2 M. & S. 172; *The Gracie D. Chambers*, 253 Fed. 182, *affd.* 248 U. S. 387, 39 S. Ct. 149; *Railway Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; *Illinois Central R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Gregory v. Wabash Ry. Co.*, 46 Mo. App. 574; *Clarke v. Needles*, 25 Pa. 358.

<sup>54</sup> *Canadian Pac. R. Co. v. Wieland*, 226 Fed. 670, 141 C. C. A. 426; *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, 74 N. W. 301; and see cases in the preceding note.

<sup>55</sup> *Converse v. Norwich, etc., Transportation Co.*, 33 Conn. 166; *Green v. Milwaukee, etc., R. Co.*, 41 Iowa, 410; *Whitehurst v. Texas &c. R. Co.*, 131 La. 139, 59 So. 42. See also *Arthur v.*

The domestic and export bills of lading prescribed by the Interstate Commerce Commission in 1919 provide expressly that "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels."<sup>55a</sup> The carrier, moreover, may receive goods as a warehouseman not to be forwarded immediately or until other instructions are received. In such a case the carrier's liability is that of warehouseman until the time for immediate transportation arrives.<sup>56</sup> At the point of destination the carrier is not bound to seek the consignee and make personal tender of delivery to him, if the carrier's regular means of carriage involve the use of fixed routes or termini. A vessel cannot go to the consignee's place of business, nor a railroad company move its cars except upon its tracks. Accordingly such carriers are not bound to deliver personally.<sup>57</sup> Express companies, on the other hand, must make personal delivery.<sup>58</sup> Where personal delivery is not required, the rule is clear that carriers by water must give notice that the vessel has arrived and that the goods are ready for delivery, and that a reasonable time after such notice must elapse before the carrier by storing the goods for the owner can reduce his responsibility to that of a warehouseman, or by putting them in a place of safety be freed altogether from liability.<sup>59</sup> There is much conflict,

Texas &c. R. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590, and 32 L. R. A. (N. S.), 313, and note, L. R. A. 1916 C. 606, and note. Cf. Gulf Coast Trans. & Co. v. Howell, 67 Fla. 508; Packard v. Getman, 6 Cow. 757, 16 Am. Dec. 475.

<sup>55a</sup> See *Bianche v. Montpelier &c. R. Co.* (Vt.), 104 Atl. 144, where a somewhat similar provision was enforced.

<sup>56</sup> *Murray v. International Steam-Co.*, 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; *Chas. W. Shepherd Cotton Co. v. New Orleans &c. Co.*, 118 Miss. 464, 78 So. 193; *Moses v. Boston & Maine R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Rogers v. Wheeler*,

52 N. Y. 262; *Schmidt v. Chicago, etc., Ry. Co.*, 90 Wis. 504, 63 N. W. 1057.

<sup>57</sup> *Hyde v. Trent, etc., Navigation Co.*, 5 T. R. 389; *Union Steamboat Co. v. Knapp*, 73 Ill. 506; *Jarrett v. Great Northern Ry. Co.*, 74 Minn. 477, 77 N. W. 304.

<sup>58</sup> *American Merchants', etc., Express Co. v. Wolf*, 79 Ill. 430; *Packard v. Earle*, 113 Mass. 280; *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Hutchinson v. United States Express Co.*, 63 W. Va. 128, 159 S. E. 949.

<sup>59</sup> *The Eddy*, 5 Wall. 481, 18 L. Ed.

however, as to the duty of carriers by land. I hold that after arrival of the goods and their place suitable for their delivery to the consignee liability becomes that of a warehouseman though to the consignee of their arrival has been given decisions, however, require notice to the consignee carrier ceases to be liable as such;<sup>61</sup> and even notice is required by the general law, custom and practice of the carrier to the requirement.<sup>62</sup> Still other cases where the carrier remains an insurer until the consignee has had ample time within which to remove the goods.<sup>63</sup>

486; *The Titania*, 131 Fed. 230, 65 C. C. A. 215; *Sonia Cotton &c. Co. v. Red River*, 106 La. 46, 30 So. 305; *Rosenstein v. Vogemann*, 184 N. Y. 330, 77 N. E. 626, 6 Ann. Cas. 13. Cf. *Constable v. National S. S. Co.*, 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; and see note 6 Ann. Cas. 16.

<sup>60</sup> *Georgia & A. Ry. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199, 206, 20, 69 N. E. 825; *Chicago, etc., R. Co. v. Reyman (Ind.)*, 73 N. E. 587; *Mohr v. Chicago, etc., R. Co.*, 40 Ia. 579; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433. (But if consignees are expected to unload directly from the cars, notice is necessary. *Bachant v. Boston, etc., R. Co.*, 187 Mass. 392, 73 N. E. 642; *Garvan v. New York, etc., R. Co.*, 210 Mass. 275, 96 N. E. 717), *Herf, etc., Co. v. Lackawanna Line*, 100 Mo. App. 164, 73 S. W. 346; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492; *Moyer v. Pennsylvania R. Co.*, 31 Pa. Super. 559.

<sup>61</sup> *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256-260; *Chapman v. Great Western Ry. Co.*, 5 Q. B. D. 278; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, 16 So. 140 (cf. *Tallassee Falls Mfg. Co. v. Western Ry. Co.*, 128 Ala. 167, 29 So. 203); *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425. 28 L. R. A. 80, 46 Am. St. 208; *Caval-*

*laro v. Texas, etc., R. Co.*, 134 F. 348, 42 Pac. 918, 52 L. R. A. 101 (1918), 78 So. 667; *Western Ry. Co. v. Atlantic Coast Line*, 139 Mich. 745; *Railroad Co. v. Burr*, 490, 36 So. 449; *Burr v. Co.*, 71 N. J. L. 263, 58 N. J. 100; *Plin v. Erie R. Co.*, 9 Atl. 807; *Pelton v. R. Co.*, 54 N. Y. 214, 11 N. Y. 214; *Faulkner v. Hart*, 82 Am. Rep. 574; *Dial Island R. Co.*, 62 N. Y. Misc. 444; *Railroad Co. v. Ohio St.*, 408, 39 N. E. 100; *Co. v. Naive*, 112 Tenn. 124, 64 L. R. A. 443; *Ry. Co. v. Haynes*, 7 S. W. 398; *Richards v. Pac. R. Co.*, 19 Ont. 100; knowledge by the consignee sufficient in *Rosenbaum v. Pac. Ry. Co.*, 101 Wash. 238.

<sup>62</sup> *Herf &c. Co. v. Lackawanna Line*, 100 Mo. App. 164, 73 S. W. 346; *Tallassee Falls Mfg. Co. v. Western Ry. Co.*, 128 Ala. 167, 29 So. 203.

<sup>63</sup> *Missouri Pac. Ry. Co. v. Berger*, 67 Kan. 846; *Jeffersonville R. Co. v. Bush*, 468; *Lewis v. Louisville R. Co.*, 135 Ky. 100; *New Orleans &c. R. Co.*

The Interstate Commerce Commission has now held itself empowered, by the Congressional legislation controlling it, to settle the conflicting rules on the subject by a provision in the prescribed uniform bills of lading,<sup>64</sup> and the following is part of section 1 of the conditions on the back of the domestic bill. "The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order, has been made."<sup>65</sup>

**§ 1105. Initial carrier made liable by statute for default of subsequent carrier.**

It has been customarily provided in bills of lading for through transportation that the carrier should not be liable for loss or damage which did not occur on its own line. The Carmack amendment to the Interstate Commerce Acts,<sup>66</sup> however, made the original carrier directly liable for any loss on a through interstate shipment, and invalidated any agreement or regulation to the contrary.<sup>67</sup> It is still possible, however, for any carrier but the initial carrier to take advantage of a provision in the contract or in the common law limiting its liability to losses occurring on its own line.<sup>68</sup>

333, 335; *Moses v. Boston & Maine R. Co.*, 32 N. H. 523; *Welch v. Concord R.*, 68 N. H. 206; *Winslow v. Vermont & Mass. R.*, 42 Vt. 700, 705; *Berry v. West Va. & P. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781; *Backhaus v. Chicago & N. W. Ry. Co.*, 92 Wis. 393, 395, 66 N. W. 400.

<sup>64</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. 671, 695-702.

<sup>65</sup> The condition in the Uniform Export Bill is identical except that the last clause reads "after placement of the property for delivery at the port

of export, or tender of delivery of the property to the party entitled to receive it has been made."

<sup>66</sup> Act of June 29, 1906.

<sup>67</sup> See *Atlantic R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

<sup>68</sup> *Southern Ry. Co. v. Lewis & Adcock Co.*, 139 Tenn. 37, 201 S. W. 131, L. R. A. 1918 C. 976. See also *Southern Ry. Co. v. Morris*, 147 Ga. 729, 95 S. E. 284; *Gillikin v. Norfolk & Southern R.*, 174 N. Car. 137, 93 S. E. 469.

The provisions of the Carmack Amendment, moreover applicable only to transportation in the United States, the Uniform Export Bill of Lading prescribed by the Interstate Commerce Commission in 1919 contains the provision that "no carrier shall be liable for loss, damage, or injury not occurring on its own road or its own water line or any portion of the through route, nor after said property has been delivered to the next carrier."<sup>69</sup>

### § 1106. Statutory limitation of liability.

By statute passed for the encouragement of shipping, the United States limited the liability of a shipowner to such an amount as his share of the vessel bears to the voyage and the aggregate liability may not exceed the value of the vessel and freight. This legislation covers all liabilities in tort and in contract incurred without fault or personal negligence on the part of the owner.<sup>71</sup> But it does not limit the owner's liability upon such contracts as he may make personally.<sup>72</sup> By the Harter Act of 1893,<sup>73</sup> the owner's liability for the negligence of his servants is in some cases totally excluded, not merely limited. But the owner is prohibited from unduly limiting by contract his liability. The Harter Act, which applies to all vessels travelling between an American and a foreign port or from one American port to another,<sup>74</sup> provides in section 1, that "it is unlawful for any vessel transporting merchandise to insert in any bill of lading or shipping document any clause relieving it from liability

<sup>69</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. 671.

<sup>70</sup> Act of June 26, 1884, 23 U. S. Stat. 57, c. 121.

<sup>71</sup> Richardson v. Harmon, 222 U. S. 96, 222 L. Ed. 110, 32 Sup. Ct. 27. The legislation protects foreign owners in United States court from liability beyond the statutory amount. The Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 Sup. Ct. 664.

<sup>72</sup> Great Lakes Towing Co. v. Mills Transportation Co., 155 Fed. 11, 16, 83 C. C. A. 607, 612, 22 L. R. A. (N. S.) 769; The Loyal, 204 Fed. 930, 123

C. C. A. 252. Where the master or owner signed a charter party as for a partnership of which he was a member, there was no limitation of liability. Pendleton v. Benner, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770.

<sup>73</sup> 27 U. S. Stat. 445, 3 U. S. Stat. (1901), p. 2946.

<sup>74</sup> The Germanic, 196 U. S. 56, 25 L. Ed. 610, s. c. *sub. nom.* The Germanic Steam Navigation Co. v. Aitken, 157 U. S. 317; *Re Piper Aden Gunboat Co.*, 86 Fed. 670.

'for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its . . . charge.' By the terms of section 2 of the Act, the owners, or agents, cannot insert in any bill of lading or shipping document, any clause lessening, weakening, or avoiding the obligations of the owners, to exercise due diligence to properly equip, man, provision, and outfit the vessel. Section 3 of the Act exempts vessels from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, or from losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or inherent defect in the thing carried, [seizure under legal process, attempting to save life or deviating for that purpose] etc., provided the owner shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied."<sup>75</sup> Section 2 evidently "deals not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence."<sup>76</sup> The third section not only codifies certain exemptions from liability allowed by the admiralty and common law, but frees the owners entirely in the other cases stated in the statute.<sup>77</sup>

<sup>75</sup> *The Jeannie*, 225 Fed. 178, 184.

<sup>76</sup> *The Carib Prince*, 170 U. S. 655, 660, 42 L. Ed. 1181, 18 S. C. Rep. 753, 755, quoted in *The Jeannie*, 225 Fed. 178, 185. See also *Herman v. Compagnie Générale Transatlantique*, 242 Fed. 859, 155 C. C. A. 447.

<sup>77</sup> In *The Silvia*, 171 U. S. 462, 466, 19 Sup. Ct. 7, 43 L. Ed. 241, the court said: "This case does not require a comprehensive definition of the words

'navigation' and 'management' of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in

**§ 1107. A carrier may limit its liability by contract.**

The right of a private carrier to limit its liability is subject to the same qualification as the right of a warehouseman.<sup>78</sup> The narrower power of a common carrier to do so has been thus stated: "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."<sup>79</sup> Contracts may thus exclude liability for

not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good v. London Steamship Owners' Association*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael v. Liverpool Shipowners' Association*, 19 Q. B. D. 242; *Canada Shipping Co. v. British Shipowners' Association*, 23 Q. B. D. 342; *The Ferro* (1893), Prob. 38; *The Glenochil*, [1896] Prob. 10."

In *Hanson v. Haywood Bros., etc., Co.*, 152 Fed. 401, 402, 81 C. C. A. 527, the court said: "The departure from Charlevoix on the voyage to Chicago was an exercise of the master's prerogative in the management and navigation of the vessel, and we are of opinion that it was plainly within the terms and intent of the foregoing limitation of liability for faults or errors therein. Assuming (without deciding) that it was the duty of the master, not only to

ascertain the full import of the reports at the signal station, but to rely upon such general warnings, rather than his own observation and judgment, and discontinue his voyage—when it was his belief that the signal as displayed meant favorable wind without serious danger—such obligation on his part was due alike to vessel and cargo. Under the express terms of the statute, the assumed fault in prosecuting the voyage is not attributable to the seaworthy vessel or her owners, as it relates alone to the management and navigation of the vessel. *The Silvia*, 171 U. S. 462, 466, 19 Sup. Ct. 7, 46 L. Ed. 241; *The Wildcroft*, 130 Fed. 521, 65 C. C. A. 145, affirmed 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; *The Etona*, 71 Fed. 895, 38 U. S. App. 50, 18 C. C. A. 380, aff'g 64 Fed. 880; *The Guadeloupe* (D. C.), 92 Fed. 670."

<sup>78</sup> See *supra*, § 1046, *ad fin.*

<sup>79</sup> *Liverpool, etc., S. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 32 L. Ed. 788, 9 Sup. Ct. 469. See also *New*

fire,<sup>80</sup> loss by theft,<sup>81</sup> by strikes or violence,<sup>82</sup> by perils of the sea,<sup>83</sup> or by leakage or breakage.<sup>84</sup> In the uniform bill of lading recommended in 1908 by the Interstate Commerce Commission<sup>85</sup> and thereafter in general use on railroads in the northern and western parts of the United States both for interstate and intrastate shipments, it is agreed in consideration of a lower rate than that chargeable for carriage under common-law liability that "No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damages thereto, by causes beyond its control; or by floods or by fire; or by quar-

*Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Williams v. Central R. Co.*, 183 N. Y. 518, 76 N. E. 1116, affirming without opinion 93 N. Y. App. Div. 582, 88 N. Y. S. 434; *Martin v. Central R. Co.*, 121 N. Y. App. Div. 552, 106 N. Y. S. 226; *Feldman v. Old Dominion S. S. Co.*, 107 N. Y. Misc. 221, 176 N. Y. S. 183; *Homer v. Oregon Short Line R. Co.*, 42 Utah, 15, 128 Pac. 522; *Black v. Atlantic Coast Line R. Co.*, 82 S. C. 478, 64 S. E. 418, and see cases in the following notes.

<sup>80</sup> *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Rand v. Merchants' Transportation Co.*, 59 N. H. 363; *Louisville, etc., Ry. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314. This exception covers injury by smoke and by water used to extinguish a fire. *The Diamond*, [1906] p. 282.

<sup>81</sup> *The Saratoga*, 20 Fed. 869.

<sup>82</sup> *Richardson v. Samuel*, [1898] 1 Q. B. 261; *Gulf, etc., Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 918.

<sup>83</sup> Such an exception does not protect a shipowner from liability for damage primarily caused by original unseaworthiness of the vessel or by negligence in its management or loading, *the Glenfruin*, 10 P. D. 103; *The Glendarroch*, [1894] p. 226, or by an explosion in the vessel bursting open

the ship and admitting sea water. *The G. R. Booth*, 171 U. S. 450, 43 L. Ed. 234, 19 Sup. Ct. Rep. 9. Proof of injury by sea water raises no presumption that the loss was due to perils of the sea. *The Folmina*, 212 U. S. 354; *Herman v. Compagnie Générale Transatlantique*, 242 Fed. 859, 155 C. C. A. 447.

<sup>84</sup> Though this exception does not protect the carrier from the consequences of negligence in loading or otherwise which results in leakage or breakage, *Philips v. Clark*, 2 C. B. (N. S.) 156, the burden is upon the owner of the goods to establish that leakage or breakage when proved was caused by such negligence. *Czech v. General Steam Co.*, L. R. 3 C. P. 14; *The Henry B. Hyde*, 90 Fed. 114, 32 C. C. A. 534; *The Lennox*, 90 Fed. 308. The difference between such a case where the fact of the injury brings the case within the exception in the absence of other evidence, and a case like that of wetting by sea water, where the injury being equally likely to have been caused in any one of several ways, no presumption is raised that it was caused by a peril of the seas, is pointed out in *The Folmina*, 212 U. S. 354, 53 L. Ed. 546, 29 Sup. Ct. Rep. 363.

<sup>85</sup> In the Matter of Bills of Lading, 14 Interstate Com. Com. Rep. 346.

antine; or by riots, strikes or stoppage of labor; or by leakage, breakage, chafing loss in weight, changes in weather, frost, wet, or decay; or from any cause if it be necessary is usual to carry such property upon open cars." In the Commission prescribed a form for domestic bills and for export bills.<sup>86</sup> In Section 1 of the conditions in the domestic bill it is provided: "No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, or delay caused by act of God, the public enemy, the authority of law, or by act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouse only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawful file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at a port of export (if intended for export) has been duly given or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper or owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton or from delay caused by riots or strikes." An elaborate provision in regard to delay or damage by quarantine then follows. The export bill contains provisions identical with the words quoted above, except that instead of the words "after placement of the property for delivery at destination, or tender of property upon consignee's order" the export bill reads, "after placement of the property for delivery at the port of export, or tender of property to the party entitled to receive it." In the export bill also the words "delay caused by" in the last line of the quoted paragraph are omitted, with the effect of excusing the carrier

<sup>86</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. Rep. 67

from any damage caused by riots or strikes and not simply such damage as is due to delay.

An exception to the general rule has been made by statutes or Constitutions in a few States which prohibit common carriers from limiting their common-law liability as insurers.<sup>87</sup> These provisions, however, have no longer any force so far as interstate shipments are concerned, since the Supreme Court of the United States has held that the Carmack Amendment of 1906 to the Interstate Commerce Acts has taken from the States the power to make rules governing the validity of contracts for interstate shipments.<sup>88</sup>

An exception preventing the carrier from being liable in damages does not necessarily preclude a shipper or charterer from discontinuing performance of the contract because of the carrier's non-performance. It is possible, however, to provide that the charterer must continue performance in spite of non-performance in some respect on the part of the carrier due to excepted perils, or it may in terms be provided that in such an event the parties are mutually absolved.<sup>89</sup> A carrier may also require as a condition of its liability that certain methods shall be used by the owner of goods in regard to their transportation. At common law the fact that the owner of goods was present or sent his servant to look after goods in transit did not limit the liability of the carrier.<sup>90</sup> But when the system of checking baggage and carrying it in a separate car was developed, a passenger who failed to take advantage of the provision thus afforded him, and carried his property with him in a passenger coach, could hold the carrier liable only by showing negligence of the carrier or misconduct of its servants.<sup>91</sup>

<sup>87</sup> See *Railway Co. v. Sherlock*, 59 Kans. 23, 51 Pac. 899; *The City of Clarksville*, 94 Fed. 201; *Lucas v. Burlington, etc., Ry. Co.*, 112 Ia. 594, 84 N. W. 673; *Pennsylvania Co. v. Kennard, etc., Co.*, 59 Neb. 435, 81 N. W. 372; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323.

<sup>88</sup> See *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *American Express Co.*

*v. United States Horseshoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990, and cases cited.

<sup>89</sup> See *supra*, § 1103.

<sup>90</sup> *Robinson v. Dunmore*, 2 B. & P. 416; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Borden v. New York Central R.*, 98 N. Y. Misc. 574, 575, 162 N. Y. S. 1099.

<sup>91</sup> *Bernheim v. G. W. Railway Co.*, 3 C. P. D. 221; *Henderson v. Louis-*

**§ 1108. Carrier's right to stipulate for insurance.**

A common carrier may not provide that it shall not be liable unless the shipper insures the goods for its benefit. It may, however, provide that if the shipper has insured at the time of the loss which he can make available for the carrier, or which he has collected unconditionally, the carrier may claim the benefit of the insurance;<sup>93</sup> and the forms of domestic and export bills of lading prescribed in 1916 by the Interstate Commerce Commission contain the clause: "Any carrier or party liable on account of loss or damage to any of said property, shall have the full benefit of insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, that the carrier reimburse the claimant for the premium paid thereon."

**§ 1109. A carrier may not stipulate for freedom from liability for negligence**

In most of the United States it is held unreasonable for a carrier to stipulate against liability for losses caused by negligence of itself or of its servants. Therefore, where a contract of a carrier provides in general terms that its liability for losses from specified perils is excluded or limited, an exception to this limitation is implied of losses from specified causes where the negligence of the carrier contributed to the loss; and even though the contract specifically provides for freedom from or limitation of liability for loss which the negligence of the carrier or of its servants or agents

ville, etc., R. Co., 20 Fed. 430, 123 U. S. 61, 31 L. Ed. 92, 8 Sup. Ct. Rep. 60; *Defrier v. Nicaragua*, 81 Fed. 745; *Cohen v. Frost*, 2 Duer, 335, 341; *Weeks v. New York, N. H. & H. R. Co.*, 9 Hun, 669, 671; *Carpenter v. New York, N. H. & H. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; *Knieriem v. New York, C. & H. R. Co.*, 109 N. Y. App. Div. 709, 96 N. Y. S. 602. In *Borden v. New York Central R. Co.*, 98 N. Y. Misc. 574, 162 N. Y. S. 1099, the

plaintiff lost jewelry which she was carrying with her. The court held in view of a notice of the railroad company forbidding the passengers to carry jewelry in the baggage turned over to the carrier for its exclusive custody, the common-law rule was applicable to jewelry carried personally and the carrier was liable as an insurer.

<sup>92</sup> *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 139, 9 Sup. Ct. 249, 32 L. Ed. 612.

<sup>93</sup> *Ibid.*

contributed, the provision is generally invalid as contrary to public policy.<sup>94</sup> In England, however, it is held that by a clearly expressed contract a carrier may exempt itself from liability for its own negligence or that of its servants.<sup>95</sup>

This rule is followed in Canada,<sup>96</sup> and in New York.<sup>97</sup> In

<sup>94</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499; *Thomas v. Wabash, etc., Ry. Co.*, 63 Fed. 200; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793; *Little Rock, etc., Ry. Co. v. Talbot*, 39 Ark. 523, 47 Ark. 97, 14 S. W. 471; *Union Pacific R. Co. v. Rainey*, 19 Col. 225, 34 Pac. 986; *Denver & Rio Grande R. Co. v. Teufel*, (Colo. 1918), 172 Pac. 1060; *Central, etc., Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Chicago & Northwestern Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Insurance Co. v. Lake Erie, etc., R. Co.*, 152 Ind. 333, 53 N. E. 382; *Kansas City, etc., R. Co. v. Simpson*, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush, 688; *Fisher v. Boston, etc., R. Co.*, 99 Me. 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. Rep. 283; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534; *Hill Mfg. Co. v. New Orleans &c. R. Co.*, 117 Miss. 548, 78 So. 187, certiorari denied, 248 U. S. 571, 39 Sup. Ct. 11; *Stanard, etc., Co. v. White Line, etc., Co.*, 122 Mo. 258, 26 S. W. 704; *Merrill v. American Express Co.*, 62 N. H. 514; *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442, 57 Atl. 139; *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 573; *McNeill v. Durham, etc., R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227, 242, 243;

*Union Express Co. v. Graham*, 26 Oh. St. 595; *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, 30 Atl. 498, 27 L. R. A. 228, 45 Am. St. Rep. 674; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Nevius v. Chicago, etc., Ry. Co.*, 124 Wis. 313, 102 N. W. 489, 109 Am. St. Rep. 935.

<sup>95</sup> *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412; *Pyman S. S. Co. v. Hull, etc., R. Co.*, [1904] 2 K. B. 788; *Baxter's Leather Co. v. Royal, etc., Packet Co.*, [1908] 2 K. B. 626; *The Marriott v. Yeoward*, [1909] 2 K. B. 987; *Shepard v. Midland R. Co.*, 140 L. T. 89.

<sup>96</sup> *Spettigue v. Great Western Ry. Co.*, 15 Up. Can. C. P. 315; *Hamilton v. Grand Trunk Ry. Co.*, 23 Up. Can. Q. B. 600.

<sup>97</sup> *Ulrich v. New York, etc., R. Co.*, 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369; *Zimmer v. New York, etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642. In *Gardiner v. New York Central R. Co.*, 201 N. Y. 387, 391, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912 B. 281, the court said: "That a clause simply releasing a carrier from liability for loss of goods will not include a case . . . of its own negligence unless such exemption is expressly and plainly stated," but "that a clause in consideration of reduced rates properly and reasonably limiting the liability of a carrier to a specified valuation of the goods received by it will include a case of loss or damage arising from its own negligence without express mention thereof." See also

a few States, though exemption from liability for gross negligence cannot be stipulated for, liability for ordinary negligence may be.<sup>98</sup> A distinction is taken between services for which the carrier receives compensation and services rendered gratuitously. As to the latter, the carrier may everywhere contract for freedom from liability for negligence. Therefore a gratuitous pass providing that a passenger riding thereon exempts from liability the carrier for injuries caused by the negligence of the carrier is enforced according to its terms.<sup>99</sup> It is important to observe, however, that transportation is not necessarily gratuitous because no payment is directly made for it. Thus where an employee is given a pass as part of his compensation,<sup>1</sup> or a caretaker of animals is given a pass as part of a transaction involving transportation of the

*Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199; *Heuman v. M. H. Powers Co.*, 226 N. Y. 205, 123 N. E. 373.

<sup>98</sup> *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Wabash, etc., R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Chicago, etc., R. Co. v. Calumet, etc., Co.*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 24 N. W. 618.

<sup>99</sup> *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408; *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. 515; *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Payne v. Terre Haute, etc., R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston & Maine R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; *Anderson v. Erie R. Co.*, 223 N. Y. 227, 119

N. E. 557; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. But see *Mobile & Ohio R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Gulf, Colorado, etc., Ry. Co. v. McGown*, 65 Tex. 640.

In *Anderson v. Erie R. Co.*, 223 N. Y. 277, 119 N. E. 557, the court held that an agreement in consideration of the sale of a ticket for a reduced price, to exempt the carrier from liability for negligence was valid, relying on the cases of passes. The decision is in line with the English and New York cases (*supra*, n. 95, 97), relating to negligent loss of goods, but as the prevailing American rule is opposed to those cases, it is not probable that the *Anderson* decision will be generally followed.

<sup>1</sup> *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; *Dugan v. Blue Hill St. Ry. Co.*, 193 Mass. 431, 79 N. E. 748.

animals for hire,<sup>2</sup> the passenger is carried for compensation, and the carrier cannot exempt itself from liability for the consequences of its own negligence. It will be remembered throughout this discussion that since the Carmack Amendment to the Interstate Commerce Statutes, the Federal rule in regard to the creation and the validity of any contracts relating to interstate shipments is imposed on all persons irrespective of State statutes or of decisions of State courts in which enforcement of rights is sought;<sup>3</sup> but the prohibition of free passes in the Interstate Commerce Act expressly excepts necessary caretakers of livestock, poultry and fruit; and though it might seem from the wording of the statute that passes given such persons were "free passes," the Supreme Court has held that the previously "settled rule of policy" that such a person was a passenger for hire "must be considered unmodified" by the statute.<sup>4</sup>

**§ 1110. Limitation of the amount for which a carrier shall be liable.**

Instead of seeking entire exemption from liability for certain kinds of losses, or in addition to such an attempt, a carrier frequently enters into a contract with a shipper by which it is agreed that the liability of the carrier for any loss shall be limited to an agreed sum. If this sum represents a reasonable attempt of the parties to fix a fair value of the property in question the agreement is in effect one for liquidating damages and is unquestionably valid.<sup>5</sup> Often, however, the sum limited is an arbitrary one and it has been said: "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more

<sup>2</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499, 61 L. Ed. 1131.

<sup>3</sup> See *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *American Express Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990.

<sup>4</sup> *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499.

<sup>5</sup> *Kuhnhold v. Compagnie Générale*, 251 Fed. 387; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Brehme v. Dinsmore*, 25 Md. 328; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 10 N. E. 836; *Zimmer v. New York, etc., Ry. Co.*, 137 N. Y. 460, 33 N. E. 642.

valid because it rests upon a consideration than if it was without consideration.”<sup>6</sup> It has been held, however, by the Supreme Court of the United States,<sup>7</sup> that, though a stipulation to limit liability for the consequences of negligence might be invalid as such, an agreement as to the valuation of property is valid, and that the carrier’s liability will be restricted, even for losses due to negligence, to that valuation not by virtue of a contract to limit the liability, but by virtue of an estoppel. And this principle has been insisted upon in recent decisions of the court.<sup>8</sup> On general principles it seems that if a carrier is deceived as to the value of goods intrusted to it, the owner should be precluded from recovering more than the apparent value of the goods even though no agreement fixing a value is made;<sup>9</sup> but the carrier can hardly assert that it has been deceived unless it makes inquiry of the shipper in regard to the value of the goods, or unless the exterior appearance of the goods is such as to amount to a representation that they are different in kind or value from what is actually the case.<sup>10</sup> The carrier may go one step further. If the value of goods is not apparent because they are in closed packages, no violation is done to the rule forbidding a carrier to contract against the consequences of its own negligence if it is allowed to stipulate in the contract that in the absence of a statement by the shipper the value will be assumed to be such a stated sum as might, so far as facts appear, to be the value of the property. This is merely liquidating damages, and a provision that in the absence of a declaration by the shipper, the carrier in case of loss will be liable only for such a stipulated sum has been held, without

<sup>6</sup> *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 650, 57 L. Ed. 683, 33 Sup. Ct. 391.

<sup>7</sup> *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151.

<sup>8</sup> *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 476, 33 Sup. Ct. 267, 57 L. Ed. 600. See also *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 651, 57 L. Ed. 683, 33 Sup. Ct. 391.

<sup>9</sup> But an innocent misdescription of furs as “dry goods” for which a lower rate was chargeable was held not to preclude recovery for their loss. *New York Central R. v. Goldberg*, 250 U. S. 85, 39 Sup. Ct. 402.

<sup>10</sup> *Merchants Transportation Co. v. Bolles*, 80 Ill. 473; *Baldwin v. Liverpool, etc., Ry. Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Brown v. Camden, etc., R. Co.*, 83 Pa. 316.

perhaps too great a strain on the general principle prohibiting a contract to limit liability for negligence, to be in effect the same thing. The qualification should be made that the shipper must have freedom of choice whether he will enter into such an agreement and some consideration, such as a lower rate, be given him for so doing.<sup>11</sup> In effect, the principles which have just been stated often enable a carrier to limit the amount of its liability even for negligently caused losses, and in recent years courts have not been disposed to examine in particular cases whether an estoppel or a reasonable attempt to liquidate damages existed. Rather, on whatever reasoning, the courts have almost universally allowed the carrier to notify the shipper that it assumes as the value of goods intrusted to it what would be a reasonable amount in the average case, for the purpose of limiting its liability for the consequences even of negligent loss or injury.<sup>12</sup> That is, the reasonableness of the amount seems rather to be considered with reference to the habitual or customary reasonableness of such an amount than with reference to its reasonableness in the particular case.<sup>13</sup> Indeed the United States Supreme Court while refusing to allow a limitation of liability for negligence on any other basis than the assumed value of the goods,<sup>14</sup> has allowed the utmost freedom of

<sup>11</sup> *Arthur v. Texas & P. R. Co.*, 139 Fed. 127, 71 C. C. A. 391; *Pacific Express Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *Illinois Central R. Co. v. Craig*, 102 Tenn. 298, 52 S. W. 164.

<sup>12</sup> *Henderson v. Stevenson*, L. R. 2 H. L. (Sc.) 470; *Richardson v. Rowntree*, [1894] A. C. 217; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 S. Ct. 351; *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 327, 60 L. Ed. 1022, 36 Sup. Ct. 555; *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, rev'g, S. C. 209 Mass. 598, 95 N. E.

945, Ann. Cas. 1912 B. 669; *Tribble v. Southern Express Co.*, 248 U. S. 582, 39 S. Ct. 287. *In re Released Rates*, 13 Interstate Com. Rep. 88; *Gardiner v. New York, etc., R. Co.*, 201 N. Y. 387, 34 L. R. A. (N. S.) 826.

<sup>13</sup> In *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, it was found as a fact by the lower court that any reasonable person would have inferred from the outward appearance of the plaintiff's baggage, when tendered to the defendant for transportation, that the value largely exceeded one hundred dollars, but the recovery, was, nevertheless, limited to \$100.

<sup>14</sup> *Boston & Maine R. v. Piper*, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820.

limitation on that basis. Though both parties agreed that a valuation bears no relation to the actual value, the agreement based on a filed tariff that the value shall be taken as the actual value is effectual.<sup>15</sup> The courts have only, have refused to allow limitations of value.

A limitation is effectual as long as the service in connection with the shipment continues, limits the liability of the carrier as warehouseman while the goods are held at destination for the purposes of the contract.<sup>17</sup> Where a limitation is permitted, in cases where it the common law required that in the absence of a contract based on the shipper's misrepresentation, the carrier cannot make a contract with the shipper fixing the liability. The regulation of the carrier even with notice to the shipper is not sufficient unless assented to by him.<sup>18</sup> How a statement in a bill of lading or receipt will bind the carrier to a contract a shipper, has been considered in a previous section. But the requirement of a contract and the effect of such a contract or of local statutes has been in part done away with by the Carmack Amendment of the Interstate Commerce Act, so far as interstate shipments are concerned.<sup>20</sup> The power of a carrier to limit its liability was taken away and it was subjected to liability

<sup>15</sup> In *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 S. Ct. 351, the defendant accepted for transportation a carload of automobiles, necessarily knowing that they were of great value under an agreement in which the value was stated to be limited to \$50. The provision was upheld.

<sup>16</sup> *Pennsylvania Railroad v. Hughes*, 191 U. S. 477 (Pennsylvania), 48 L. Ed. 268, 24 Sup. Ct. Rep. 132; *Adams Express Co. v. Green*, 112 Va. 527, 72 S. E. 102, and see statutes referred to *supra*, § 1107, forbidding any variation of carrier's liability.

<sup>17</sup> *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 36 S. Ct. 177, 60 L. Ed. 453.

<sup>18</sup> In *Henderson v. Stevenson*, L. R.

2 H. L. (Sc.) 470, 47 L. R. 100. Lord Macmillan said: "I think the conclusion of liability cannot be established by clear evidence of the fact that it has been brought to the attention of the passenger and of his assent to it." See also *166 U. S. 375*, 41 L. Ed. 100, 10 S. Ct. 500, 10 N. E. 945. *Maine R. v. Hooker*, 100 Me. 526, 58 L. R. A. 450, Ann. Cas. 1915 D. 593.

<sup>19</sup> See *supra*, § 90.

<sup>20</sup> *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 868, 1915 B. L. Cas. 1915 D. 593.

value of any property lost, notwithstanding any agreement as to value, by the first Cummins Amendment to the Interstate Commerce Act enacted March 4, 1915, subject to the proviso, however, that if the goods are hidden by wrapping, boxing or otherwise and their character is not disclosed to the carrier, the shipper may be required to state in writing the value of the goods and the carrier's liability shall not exceed that amount. By the second Cummins Amendment, enacted August 9, 1916, this proviso was repealed and the full liability imposed by the first Amendment was also abolished (except as to ordinary live stock) so far as concerns property for the transportation of which the Interstate Commerce Commission has authorized rates dependent on the value declared in writing by the shipper or agreed upon in writing as the released value of the property.<sup>21</sup>

**§ 1111. Liability may be measured at place of shipment.**

A stipulation is contained in the Uniform Bill of Lading that a carrier's liability for loss shall be measured by the value of the goods at the time and place of shipment.<sup>22</sup> It has been said *obiter* by the Supreme Court of the United States that such a stipulation fixes the measure of the carrier's liability;<sup>23</sup> and this or a similar stipulation has been held valid in a number of States.<sup>24</sup> But by the rule of the common

<sup>21</sup> See *In re Cummins Amendment*, 33 Interstate Com. Com. 682; *In re Bills of Lading*, 52 *id.* 671, 683, 708.

<sup>22</sup> "The amount of any loss or damage for which any carrier becomes liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

<sup>23</sup> *Phoenix Insurance Co. v. Erie, etc., Transportation Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176. See also *The Koan Maru*, 251 Fed. 384.

<sup>24</sup> *Inman v. Seaboard Airline Ry. Co.*, 159 Fed. 960; *Pierce v. So. Pacific Co.*, 120 Calif. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; *Denver & Rio Grande R. Co. v. A. Peterson &c. Co.*, 59 Colo. 125, 147 Pac. 663; *Central of Georgia R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Tibbits v. Rock Island, etc., Ry. Co.*, 49 Ill. App. 567; *Davis v. N. Y., O., etc., Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *Rogan v. Wabash Ry. Co.*, 51 Mo. App. 665; *Gratiot Street Warehouse Co. v. Missouri &c. Ry. Co.*, 124 Mo. App.

law the measure of damages is the market value at their destination with interest from the time they should have arrived, less any unpaid transportation and if it can be assumed in any case that the place of shipment is necessarily less than the destination, the provision is in effect a limitation of liability, and the case on principle is like a case where the amount of the carrier's liability is by contract limited to an amount known by the parties to be less than the actual loss.

On this assumption the provision was held invalid in the *United States*; <sup>26</sup> and though the Interstate Commerce Commission approved its insertion in the Uniform Bill of Lading it first recommended; <sup>27</sup> it subsequently has announced its disapproval as to domestic bills the situation has been changed by the Cummins Amendments, <sup>28</sup> and that now, "the rule being superfluous so far as concerns the transportation of property shipped under rates dependent upon declared or agreed values, and unlawful and void in respect to property, we condemn it and direct its complete removal from the" new uniform bills of lading prescribed by the Interstate Commerce Commission. <sup>29</sup> The provision is, however, retained in the prescribed export bill.

### § 1112. Requirement of prompt assertion of claim against carriers.

It is a common provision in bills of lading that the carrier is not liable for loss or damage to the goods unless claim is made promptly.

545, 102 S. W. 11; *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Grubbs v. Atlantic Coast Line R. Co.*, 101 S. Car. 210, 85 S. E. 405.

<sup>26</sup> *O'Hanlon v. Railway Co.*, 6 Best & S. 484; *Rodocanachi v. Milburn*, 18 Q. B. D. 67; *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527, 4 Sup. Ct. R. 566.

<sup>28</sup> *St. Louis, Iron Mountain &c. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108, Am. St. 21, 3 Ann. Cas. 582; *Illinois Central R. Co. v. Bogard*, 78 Miss 11, 27 So. 879;

*Ruppel v. Allegheny Valley R. Co.*, Pa. 166, 31 Atl. 478; *Southern R. Co. v. D'Arcais*, 27 Tex. 64 S. W. 813.

<sup>27</sup> In the Matter of Bill of Lading, 14 Interstate Com. Com.

<sup>29</sup> The provision was held invalid in *Densmore Co. v. Chicago*, 252 Fed. 664.

<sup>29</sup> In the Matter of Bill of Lading, 52 Interstate Com. Com. 708—711.

must be made within a specified short limit of time.<sup>30</sup> If the time allowed is reasonable such a provision is valid.<sup>31</sup> Aside from the restrictions imposed on contracts for interstate carriage by the Interstate Commerce Act, the carrier may waive the benefit of limitations in its contract of carriage limiting the time for making claim, and such a waiver may be implied from conduct as well as from express language; for instance, inducing the shipper to delay making a claim within the stipulated time.<sup>32</sup> And any other conduct of the carrier the

<sup>30</sup> The Uniform bill of lading in use prior to 1919 provided, "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make the delivery within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." The bills of lading prescribed by the Interstate Commerce Commission in 1919 alter this provision. The domestic bill provides: "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or in case of export traffic within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed. Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." The export bill allows nine months for making claims.

<sup>31</sup> *Southern Express Co. v. Caldwell*,

21 Wall. 264, 22 L. Ed. 556; *Missouri, etc., Ry. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Keeney v. Chicago, etc., R. Co.* 183 Iowa, 522, 167 N. W. 475; *Metz Co. v. Boston & Maine R.*, 227 Mass. 307, 116 N. E. 475; *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Murray v. Atlantic Coast Line*, 108 S. Car. 88, 93 S. E. 387; *Houston, etc., Ry. Co. v. Houston Packing Co.* (Tex. Civ. App.), 203 S. W. 1140. Numerous decisions as to what limit of time is reasonable are collected in L. R. A., 1916 D. pages 335-352. That of four months established in the old uniform bill of lading in general use until 1919 has been upheld. *Georgia, etc., R. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 S. Ct. 541; *Higgins v. Boston & Maine R.*, 78 N. H. 609, 102 Atl. 533. See also *Chesapeake, etc., R. v. McLaughlin*, 242 U. S. 142, 61 L. Ed. 207, 37 S. Ct. 40.

<sup>32</sup> *St. Louis, etc., Ry. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248; *Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853; *Banks v. Pennsylvania R. Co.*, 111 Minn. 48, 126 N. W. 410; *Merrill v. American Express Co.*, 62 N. H. 514; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *St. Louis, etc., R. Co. v. James*, 36 Okla. 196, 128 Pac. 279; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571.

natural effect of which is to induce the shipper to fail to make a claim or bring suit within the stipulated time, as he might otherwise have done, is a waiver.<sup>33</sup> It has been held further that even though the time limited has expired so that the shipper's right has been lost, it will be revived by any conduct on the part of the carrier which treats the claim as still valid.<sup>34</sup>

Though a few decisions distinguish between an alleged waiver before the expiration of the time fixed in the contract and conduct after the expiration of that time,<sup>35</sup> the analogy of new promises to pay a debt barred by the Statute of Limitations is so strong that there seems no reason why the same exception to general principles should not be applied here, but it should be remembered that one of the requirements in regard to the Statute of Limitations is that the facts must disclose what clearly amounts to a new promise, if not in express language at least by implication. These principles have less frequent application than formerly, for now the right to waive conditions prior to their breach or to revive claims which have been lost by breach of condition is abolished, so far as contracts of interstate carriage are concerned, by the Interstate Commerce Acts.<sup>36</sup>

<sup>33</sup> *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 39 N. E. Rep. 273; *Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853; *Galveston, etc., Ry. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298; *Norfolk, etc., Railway Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

<sup>34</sup> *St. Louis, etc., R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *Post v. Atlantic Coast Line R. Co.*, 138 Ga. 763, 76 S. E. 45; *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; *Peninsula Produce Exchange v. New York, etc., R. Co.*, 122 Md. 231, 89 Atl. 437; *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750; *McFall v. Wabash R. Co.*, 117 Mo. App. 477, 94 S. W. 570; *Vencill v. Quincy, etc., R. Co.*, 132 Mo. App. 722, 112 S. W. 1030; *A. C. Cheney Piano Co. v. New York, etc., Co.*, 85 N. Y. Misc. 157, *affd.* 166 N. Y. App. Div. 706; *Isham v. Erie R.*

*Co.*, 112 N. Y. App. Div. 612, 98 N. Y. S. 609, *affd.* without opinion 191 N. Y. 547, 85 N. E. 1111; *Sauls-Baker Co. v. Atlantic Coast Line R. Co.*, 98 S. C. 300, 82 S. E. 418. See further for collection of cases on waiver of time in contracts of carriers, L. R. A. 1916 D. 1046, and note 1049.

<sup>35</sup> *Gamble-Robinson Co. v. Northern Pac. R. Co.*, 119 Minn. 40, 137 N. W. 19; *Atlantic Coast Line v. Bryan*, 109 Va. 523, 65 S. E. 30; *Old Dominion Steamship Co. v. Flanary*, 111 Va. 816, 69 S. E. 1107.

<sup>36</sup> *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 667, 59 L. Ed. 774, 35 Sup. Ct. 444. "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right

### § 1113. Liability of carriers for their passengers' safety.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract; and properly, for the obligation is wider than any that could be based on mutual assent. The carrier does not insure the passengers' safe carriage, but is liable only for negligence.<sup>37</sup> The duty imposed is to use the utmost diligence or the highest degree of care.<sup>38</sup> But how far the duty of the carrier in this respect differs from that of any one who for business purposes invites others on his premises may be questioned.<sup>39</sup> Besides the duty of avoiding negligent misconduct, the carrier is under an absolute duty to protect his passengers from the misconduct of its servants or agents.<sup>40</sup> The decisions are

of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defences open to the carrier." See also *Georgia &c. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948; *Metz Co. v. Boston & Maine R.*, 227 Mass. 307, 116 N. E. 475.

<sup>37</sup> *Readhead v. Midland Railway Co.*, L. R. 2 Q. B. 412, 4 *id.* 379; *The Oregon*, 133 Fed. 609, 68 C. C. A. 603.

<sup>38</sup> Numerous cases are collected in 2 *Hutchinson, Carriers*, §§ 895, 896.

<sup>39</sup> See 31 *Harv. L. Rev.* 306.

<sup>40</sup> In *Dwinelle v. New York Cen. & Hud. R. Co.*, 120 N. Y. 117, 122, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the court said: "As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and during its performance to care for his comfort and safety. The duty of protecting the personal safety of the passenger, and promoting by every reasonable means the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveller, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it." To the same effect are the following: *Pittsburg, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 214, 2 Am. Rep. 39; *Chamberlain v. Chandler*, 3 Mason, 242, 245, Fed. Cas. No. 2,575; *Pendleton v. Kinsley*, 3 Cliff. 416, 417, Fed. Cas. No. 10,922;

often rested on the ground that the action of the carrier or agent was within the scope of his employment. In many cases this may be true, but when the act had no relation to the carrier's business and though done in the carrier's vehicle or station was due wholly to the interests or motives of the servant, the carrier's liability must be rested on the broader ground previously stated in connection with innkeepers.<sup>42</sup> The carrier must

*Bryant v. Rich*, 106 Mass. 180, 188, 8 Am. Rep. 311; *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 548, 42 Am. Rep. 33; *So. Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

<sup>41</sup> In *Clancy v. Barker*, 131 Fed. 161, 166, 66 C. C. A. 469, the court said: "In *Dwinelle v. New York Central, etc., R. Co.*, 120 N. Y. 117, 126, 127, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the porter of a sleeping car, who had taken up a ticket of a passenger, was held to be acting within the scope of his employment when he struck the passenger during an altercation between them relative to the return of the ticket.

"In *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, 591, 43 Am. Rep. 185, the court declared the limit of the company's liability to be 'to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger,' and held that a driver of a street car, who was also the conductor, and who beat a passenger in the car, was within the scope of his employment to carry the passenger safely when he committed the assault.

"In *Goddard v. Grand Trunk Railway*, 57 Me. 202, 203, 2 Am. Rep. 39, a brakeman, who had authority to collect tickets, and who, after collecting one from a passenger, demanded another of him, and grossly insulted him because he declined to pay for his pas-

sage again, was held to be acting within the scope of his employment, and the company was charged with the damages he inflicted.

"So in *Croaker v. Chicago & Western Ry. Co.*, 36 Wis. 2d, 4 Am. Rep. 504, a conductor who assaulted a passenger; in *Pendleton v. Chicago & N. W. Ry. Co.*, 133 Ill. 3 Cliff. 416, 427, 428, 10,922, the clerk of a station who assaulted a passenger while collecting his fare; in *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33, a brakeman who assaulted a passenger because during a lost watch he said he had the ticket; in *Indianapolis R. Co. v. Jackson*, 19, 22, a conductor or brakeman who drenched a passenger with water; in *Campbell v. Palace Car Co.*, 485, a porter of a sleeping car who made indecent proposals to a passenger; in *Williams v. Pullman Car Co.*, 40 La. Ann. 417, 85, 8 Am. St. Rep. 538, a Pullman car who assaulted a passenger; and in *Dickson v. Walden*, 507, 34 N. E. 506, 24 L. R. A. 1, 17 Am. St. Rep. 440, the ticket collector, a special policeman of a train, in endeavoring to sell the ticket to a customer, assaulted him—to be, and undoubtedly was, acting within the scope of their employments when they inflicted injuries for which the defendant was made to pay."

<sup>42</sup> See *supra*, § 1070.

the same reasonable care to protect a passenger from injury by third persons, that is required of it in the general performance of its business.

#### § 1114. Telegraph companies.

Telegraph companies are not common carriers.<sup>43</sup> Such a company is a public service corporation,<sup>44</sup> but does not insure the success of the performance which it undertakes. The obligation implied or imposed is to use due care to transmit a message correctly,<sup>45</sup> and to use such care to deliver messages with reasonable promptness.<sup>46</sup> It is common for telegraph companies to attempt to limit their liabilities by provisions, on blanks furnished for messages, to the effect that unless the message is repeated (for which an additional charge is made), the company shall not be liable beyond the price received for sending the message. Such a stipulation is held valid, except for defaults due to willfulness or gross

<sup>43</sup> *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 301, 18 Am. Rep. 485; *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 463, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917. There are contrary decisions, but they often mean no more than that a telegraph company is under the duties of a public service corporation. The following decisions relate to telephone companies, but it is assumed or stated that the law regarding telegraph companies is the same. *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111; *State v. Cumberland Tel. & Tel. Co.*, 114 Tenn. 194, 86 S. W. 390. By the Mississippi Constitution, telegraph companies are declared common carriers. *Postal Tel. &*

*Cable Co. v. Wells*, 82 Miss. 733, 35 So. 190.

<sup>44</sup> *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *Chesapeake, etc., Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. It is so far engaged in interstate commerce as to be subject to federal regulation through the Interstate Commerce Commission. 36 U. S. Stat. 544, § 7.

<sup>45</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Breese v. U. S. Telegraph Co.*, 48 N. Y. 132, 8 Amer. Rep. 526; *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

<sup>46</sup> *Western Union Tel. Co. v. Elliott*, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

negligence, in England,<sup>47</sup> Candaa,<sup>48</sup> and many of the United States.<sup>49</sup> Many States, however, hold the stipulation opposed to public policy and void.<sup>50</sup> Whether the amendment of June 18, 1910 to the Interstate Commerce Acts, involves the invalidity of state rules and the substitution of a uniform federal rule has not yet been definitely decided.<sup>51</sup> In some jurisdictions a distinction is taken between errors which

<sup>47</sup> *McAndrew v. Electric Tel. Co.*, 17 C. B. 3.

<sup>48</sup> *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470.

<sup>49</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Amer. Dec. 519; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 125, 83 N. E. 313; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Williams v. Postal &c. Tel. Co.*, 122 Va. 675, 95 S. E. 436.

<sup>50</sup> *American Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 So. 660; *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Amer. Rep. 136; *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 43 So. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279 [see also as to Illinois law, *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180]; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Harkness v. Western Union Tel. Co.*

73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Crall*, 38 Kans. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *LaGrange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733, 35 So. 190; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *Western Union Tel. Co. v. Longwill*, N. Mex. 308, 21 Pac. 339; *Williamson v. Postal Tel. Cable Co.*, 151 N. C. 223, 65 S. E. 974 (but see *Meadows v. Postal &c. Tel. Co.*, 173 N. C. 240, 91 S. E. 1009); *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Blackwell Milling, etc., Co. v. Western Union Tel. Co.*, 17 Okla. 376, 89 Pac. 235; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Postal Tel. Cable Co. v. Sunset Construction Co.*, 102 Tex. 148, 114 S. W. 98; *Western Union Tel. Co. v. Piper*, (Tex. Civ. App. 1916), 191 S. W. 817; *Wertz v. Western Union Tel. Co.*, 7 Utah, 446, 13 L. R. A. 510, 27 Pac. 172; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490 (statutory).

<sup>51</sup> See 18 Col. L. Rev. 612.

would not have been prevented by repetition and mistakes in the wording of the message which would have been thus prevented. Even admitting the validity of the stipulation generally, some courts assert that it protects the company only in the latter class of cases.<sup>52</sup> But most of the jurisdictions that uphold the stipulation enforce it in any case, whatever the character of the breach of duty, if there was neither gross negligence or wilful default. A distinction also has been suggested in regard to cipher messages, or those so written as to be obscure in meaning.<sup>53</sup>

Where a limitation of damages to the cost of the message is held invalid, stipulations limiting the amount to a multiple of the cost, such as ten times, are equally invalid.<sup>54</sup> But a distinction seems certainly possible between an agreement to liquidate possible damages at a reasonable amount and an agreement to limit damages to a nominal sum. It is also usually provided that a claim for damage must be presented within a fixed time, such as sixty days from the time when the message was filed for transmission. This is valid.<sup>55</sup> In

<sup>52</sup> *Box v. Postal Tel. Cable Co.*, 165 Fed. 139, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 520, 7 So. 419; *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

<sup>53</sup> In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 28, 38 L. Ed. 883, 14 Sup. Ct. 1098, the court held that a provision limiting liability in regard to such messages was valid. The distinction is, however, repudiated in *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Postal Tel. Co. v. Wells*, 82 Miss. 733, 35 So. 190.

<sup>54</sup> *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672 (ten times); *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky.

L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711 (fifty times); *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211, (ten times); *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490 (fifty times).

<sup>55</sup> *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117; *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Webbe v. Western Union Tel. Co.*, 64 Ill. App. 331; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Free v. Western Union Tel. Co.*, 135 Iowa, 69, 110 N. W. 143; *Russell v. Western Union Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Western Union Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313; *Cole v. Western Union Tel. Co.*, 33 Minn.

a few cases <sup>56</sup> it has been held that such a provision generally valid would not be enforced where the plaintiff was not aware of the company's negligence until after the stipulated time had elapsed, and if the plaintiff's failure to discover the facts was not culpable. These decisions are supported as a relief from a penal effect of the provision but a few decisions have extended the stipulation by construction so as to permit lapse of the stipulated number of days from the plaintiff's acquisition of knowledge of the facts.<sup>57</sup> Such a construction imposes too violent a strain on the language, and there are contrary and better decisions <sup>58</sup> denying any extension of the plaintiff's right of action where there still remained, after discovery of the right of action, an ample time to make a claim within the stipulated sixty

**§ 1115. Legislation regarding bills of lading.**

An attempt has been made to codify the law governing bills of lading. The primary object of those seeking to do this about was to procure uniformity in regard to the liability of order bills of lading—a matter in regard to which mercantile custom and the custom law were in conflict. The decisions of some States, adopting to a greater or less degree

227, 22 N. W. 385; *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448, 36 So. 539, 105 Am. St. Rep. 459; *Thorp v. Western Union Tel. Co.*, 118 Mo. App. 398, 94 S. W. 554; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Sykes v. Western Union Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387 (cf. *Conrad v. Western Union Tel. Co.*, 162 Pa. 204, 29 Atl. 888.); *Smith v. Western Union Tel. Co.*, 77 S. C. 378, 58 S. E. 6; *Kirby v. Western Union Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 612, 621, 624, 46 Am. St. Rep. 765, *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; *Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W.

63; *Brooks v. Western Union Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Heard v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

<sup>56</sup> In *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94, and *Conrad v. Western Union Tel. Co.*, 162 Pa. 204, 29 Atl. 888. See also *Johnson v. Western Union Tel. Co.*, 33 Fed. 362.

<sup>57</sup> *Postal Telegraph Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. 16, 16 L. R. A. (N. S.) 870; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

<sup>58</sup> *Stone v. Postal-Telegraph Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795, 35 R. I. 498, 87 Atl. 46, 46 L. R. A. (N. S.) 180; *Heim v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

mercantile custom, treated order bills of lading (those in which the carrier agrees to deliver goods to the order of the consignee) as negotiable. Other courts refused to do this. The importance of negotiability it should be observed relates not only to the ownership of the goods of which the bill of lading is a symbol, but to the contractual obligations of the carrier; since the carrier may become liable to the holder of the bill not only as owner of the goods but also as entitled to enforce the promissory undertaking of the bill of lading, if it is negotiable. With these matters in mind, the Commissioners for Uniform State Laws recommended in 1909 a uniform codification of the law governing bills of lading, and this statute has been enacted in a number of States.<sup>59</sup>

### § 1116. Federal legislation on bills of lading.

It became evident from the decisions of the Supreme Court of the United States after the passage of the Carmack Amendment in 1906,<sup>60</sup> that the subject of bills of lading for the interstate transportation of goods was one of which the federal government had assumed the regulation, and that the validity and effect of such documents must be determined by Federal law.<sup>61</sup> Whether this principle invalidates not only

<sup>59</sup> It has been enacted in Alaska, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

<sup>60</sup> See *supra*, § 1073.

<sup>61</sup> In *Atchison, etc., Ry. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050, a carrier had issued a bill of lading before goods had actually come into its hands, in exchange for another bill of lading which had been issued by a connecting carrier. The second bill of lading was sold to the plaintiff who sued the railroad for failure to deliver the goods within a reasonable time after the date on which the bill of lading stated that the goods had been

received. The Kansas court allowed recovery, holding the railroad estopped in a suit by an innocent purchaser to deny that it had received the goods on the day stated in its bills of lading. The United States Supreme Court reversed the decision holding that under federal law the purchaser of the bill acquired no greater rights than the shipper who originally received it from the railroad and who, of course, had knowledge of the facts. The court said: "Whether in the absence of legislation by Congress the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below in conflict with the general commercial rule constituted a direct burden on interstate commerce and

state regulation of the contractual obligations of the carrier, but also such regulation of the effect of a bill of lading as a transfer of the title to goods behind it under a contract between buyer and seller, neither of whom perhaps was a party to the original contract of shipment, remains the only question of difficulty.<sup>62</sup> But as no change in title to the goods while in transit can be effected without a change at least in the person to whom the carrier's obligation is owing, it seems probable that an interstate bill of lading is under the control of the federal government even regarding its effect as a symbol of title. Accordingly an effort which was finally success-

was therefore void, need not now be considered. This is so because irrespective of that question, and indeed without stopping to consider the general provision of the Act to Regulate Commerce it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (act of June 29, 1906, c. 3591, § 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which in the nature of things excluded state action. *Adams Express Co. v. Croninger*, 226 U. S. 491, 505-506, 33 Sup. Ct. 148, 57 L. Ed. 314; *Missouri, etc., Ry. Co. v. Harriman*, 227 U. S. 657, 671-672, 57 L. Ed. 690; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 110, 34 Sup. Ct. 526, 58 L. Ed. 868, 1915 B. L. R. A. 450, Ann. Cas. 1915 D. 593; *Atchison, Topeka & Santa Fe Ry. v. Robinson*, 233 U. S. 173, 180, 34 Sup. Ct. 556, 58 L. Ed. 90; *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453; *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

"Indeed in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in inter-

state commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because 'Congress has legislated relative to the one, but not relative to the other.' But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld." In *United States v. Ferger*, 250 U. S. 199, 207, 39, S. Ct. 445, 447, it was held that Congress had jurisdiction to enact criminal penalties for the forgery of bills of lading (see *infra*, § 1131) though, since the bills were based on no actual shipment, interstate commerce was involved only because of the general desirability of protecting bills of lading as instruments of commerce.

<sup>62</sup> In *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025, it was held that the purchaser in Massachusetts of a foreign bill of lading acquired the rights given by the Massachusetts statute.

ful was made to secure the enactment of a Federal law substantially identical with the uniform state law except that it was limited to interstate commerce. This Act, called the Pomerene Act, was enacted in 1916. It has no application to bills of lading originating abroad. In regard to such bills and in regard to intrastate bills, local statutes and the common law are controlling.

### § 1117. The Pomerene Act.

As the Pomerene Act codifies the main principles governing bills of lading, it is here inserted. It differs in some particulars from the Uniform State law, and attention is called in the notes to these differences. The sections of the statutes imposing criminal penalties are not here inserted. The opening section defines the scope of the Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.<sup>63</sup>

### § 1118. Kinds of bills of lading which may be issued.

Section 2.—[STRAIGHT BILL DEFINED.] That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Section 3.—[ORDER BILL DEFINED.] That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regula-

<sup>63</sup> The Uniform State bill purports to cover all bills of lading issued by common carriers, and has been held to control the effect of a negotiation in Massachusetts of a bill originating in a foreign country. *Roland M. Baker Co. v. Brown*, 214 Mass. 196,

100 N. E. 1025. But it seems that the Federal Statute must have exclusive effect on all bills of lading within its terms. *Atchison &c. R. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. Rep. 665.

tion, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.<sup>64</sup>

**Section 4.—[SETS OF ORDER BILLS PROHIBITED FOR INTERSTATE SHIPMENTS.]** That order bills issued for the transportation of goods to any place in the United States on the Continent of North America, except Alaska, Panama, and Porto Rico, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part thereof for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one or more of the other parts: Provided, however, That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.<sup>65</sup>

**Section 5.—[DUPLICATE ORDER BILL MUST BE SO MARKED.]** That when more than one order bill is issued for the transportation of the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: Provided, however, That nothing contained in this section shall in such cases be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.<sup>66</sup>

<sup>64</sup> See Williston on Sales, §§ 411, 412.

<sup>65</sup> See Williston on Sales, § 441.

<sup>66</sup> See Williston on Sales, § 441.

**Section 6.—[STRAIGHT BILL IS “NON-NEGOTIABLE” AND MUST BE SO MARKED.]** That a straight bill shall have placed plainly upon its face by the carrier issuing it “non-negotiable” or “not negotiable.”

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

**Section 7.—[“ORDER-NOTIFY” BILL IS NEGOTIABLE.]** That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.<sup>67</sup>

§ 1119. Carrier's duty to deliver and effect of delivery.

**Section 8.—[CARRIER'S DUTY TO DELIVER GOODS.]** That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.<sup>68</sup>

**Section 9.—[PROPER DELIVERY RELEASES CARRIER.]** That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

<sup>67</sup> See Williston on Sales, § 287.

<sup>68</sup> See Williston on Sales, §§ 285, 424.

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Section 10.—[WHEN DELIVERY DOES NOT RELEASE CARRIER.] That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.<sup>69</sup>

#### § 1120. Cancellation or alterations of bills of lading.

Section 11.—[CANCELLATION OF ORDER BILL REQUIRED ON DELIVERY OF THE GOODS.] That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier

<sup>69</sup> See Williston on Sales, § 421.

and notwithstanding any other provision to the person entitled thereto.

**Section 12.—PARTIAL DELIVERY MUST BE NOTED OR BILL CANCELLED.** Where a bill of lading is issued in section twenty-six, and ~~any part of the goods~~ <sup>any portion of the goods</sup> is delivered by ~~any person~~ <sup>any person</sup>, if a carrier delivers part of the goods in which an order bill had been issued and ~~the bill~~ <sup>the bill</sup>—

a To ~~cancel the bill~~ <sup>cancel the bill</sup> if

b To ~~place a notation on the bill~~ <sup>place a notation on the bill</sup> that a portion of the goods has been ~~delivered~~ <sup>delivered</sup> with ~~the notation~~ <sup>the notation</sup> which may be in general terms either if the goods ~~have been~~ <sup>have been</sup> that have been so delivered or if the goods ~~are~~ <sup>are</sup> which still remain in the carriers possession. It shall be ~~void~~ <sup>void</sup> for failure to deliver all the goods ~~specified in the bill~~ <sup>specified in the bill</sup> to anyone who for value and in good faith purchases ~~the goods~~ <sup>the goods</sup> such purchaser acquired title to ~~the goods~~ <sup>the goods</sup> if ~~the delivery~~ <sup>the delivery</sup> of any portion of the goods by the carrier ~~was made~~ <sup>was made</sup> ~~standing~~ <sup>standing</sup> such delivery was made to the ~~person~~ <sup>person</sup> ~~entitled~~ <sup>entitled</sup>.

**Section 13.—ALTERATION OF BILL WITHOUT CARRIER'S AUTHORITY IS VOID.** That any alteration, addition, or erasure in a bill after it is ~~made~~ <sup>made</sup> without authority from the carrier issuing the same ~~shall be void~~ <sup>shall be void</sup> in writing or noted on the bill, shall be void ~~whenever~~ <sup>whenever</sup> in the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

§ 1121. Lost bills of lading and duplicates.

**Section 14.—LOSS OF ORDER BILL WILL NOT EXCUSE CARRIER FROM DELIVERING THE GOODS IF INDEMNIFIED.** That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction; and upon the giving of a bond with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any

<sup>70</sup> See Williston on Sales, § 424; Bab-  
hitt v. Grand Trunk Western Ry. Co.,  
209 Ill. App. 183, 285 Ill. 267, 120 N.  
E. 803.

<sup>71</sup> See Williston on Sales, § 443.

This section is taken from a stipu-  
lation in the Uniform bill of lading  
adopted by the Interstate Commerce  
Commission.

liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided: a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Section 15.—[DUPLICATE BILL.] That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.<sup>72</sup>

§ 1122. Adverse claims to the goods.

Section 16.—[CARRIER CANNOT ASSERT TITLE TO GOODS SHIPPED.] That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.<sup>73</sup>

Section 17.—[CARRIER MAY REQUIRE ALL PERSONS WHO CLAIM GOODS TO INTERPLEAD.] That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Section 18.—[CARRIER ENTITLED TO A REASONABLE TIME TO ASCERTAIN VALIDITY OF ADVERSE CLAIMS.] That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of

<sup>72</sup> See Williston on Sales, § 441.

the corresponding provisions of the

<sup>73</sup> See *supra*, §§ 1036, 1037. Also Warehouse Receipts Act, *supra*, § 1054.

and notwithstanding delivery was made to the person entitled thereto.<sup>70</sup>

**Section 12.—[PART DELIVERY MUST BE NOTED OR BILL CANCELED.]** That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carriers possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

**Section 13.—[ALTERATION OF BILL WITHOUT CARRIER'S AUTHORITY IS VOID.]** That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.<sup>71</sup>

§ 1121. Lost bills of lading and duplicates.

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<sup>70</sup> See Williston on Sales, § 424; *Babbitt v. Grand Trunk Western Ry. Co.*, 209 Ill. App. 183, 285 Ill. 287, 120 N. E. 803.

<sup>71</sup> See Williston on Sales, § 443.

This section is taken from a stipulation in the Uniform bill of lading adopted by the Interstate Commerce Commission.

liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided: a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Section 15.—[DUPLICATE BILL.] That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.<sup>72</sup>

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Section 18.—[CARRIER ENTITLED TO A REASONABLE TIME TO ASCERTAIN VALIDITY OF ADVERSE CLAIMS.] That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of

<sup>72</sup> See Williston on Sales, § 441.

the corresponding provisions of the

<sup>73</sup> See *supra*, §§ 1036, 1037. Also Warehouse Receipts Act, *supra*, § 1054.

the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.<sup>74</sup>

**Section 19.—[CARRIER CANNOT REFUSE DELIVERY EXCEPT FOR CAUSES SPECIFIED.]** That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

§ 1123. Effect of "shipper's weight, load and count" clause.

**Section 20.—["SHIPPER'S WEIGHT, LOAD, AND COUNT" CLAUSE—WHEN PROHIBITED.]** That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.<sup>75</sup>

**Section 21.—["SHIPPER'S WEIGHT, LOAD, AND COUNT" CLAUSE—EFFECT OF WHEN RIGHTFULLY INSERTED.]** That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them

<sup>74</sup> See *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Atchison &c. R. v. International &c. Co.*, 247 Fed. 265, 267, 159 C. C. A. 359.

<sup>75</sup> This section is not found in the Uniform State Act, but was inserted in the Federal statute to meet practices complained of by shippers.

and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.<sup>77</sup>

**§ 1125. Creditors' rights against goods shipped under an order bill of lading.**

**Section 23. [ATTACHMENT NOT ALLOWED OF GOODS FOR WHICH AN ORDER BILL HAS BEEN ISSUED.]** That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter,

<sup>77</sup> See Williston on Sales, § 418. The section in the Uniform State law corresponding to sections 21 and 22 of the Federal law is as follows: Section 23.—[LIABILITY FOR NON-RECEIPT OR MISDESCRIPTION OF GOODS.] If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to

(a) The consignee named in a non-negotiable bill, or

(b) The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a

statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.<sup>78</sup>

Section 24.—[ORDER BILL MAY BE ATTACHED.] That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

#### § 1126. Carrier's lien.

Section 25. — [CARRIER HAS LIEN FOR WHAT CHARGES.] That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.<sup>79</sup>

Section 26.—[IF GOODS LAWFULLY SOLD TO SATISFY LIEN CARRIER IS NOT LIABLE.] That after goods have

<sup>78</sup> Applied in *Brimberg v. Hartenfeld Bag Co.* 89, N. J. Eq. 425, 105 Atl. 68. See further Williston on Sales, §§ 438, 439.

<sup>79</sup> The corresponding section in the Uniform State Act is as follows:

Section 26.—[NEGOTIABLE BILL MUST STATE CHARGES FOR WHICH LIEN IS CLAIMED.] If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those

goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

§ 1127. How bills of lading may be negotiated or transferred.

Section 27.—[WHEN ORDER BILL MAY BE NEGOTIATED BY DELIVERY.] That an order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.<sup>80</sup>

Section 28.—[ORDER BILLS NEGOTIATED BY INDORSEMENT.] That an order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.<sup>81</sup>

Section 29.—[TRANSFER OF STRAIGHT BILL.] That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.<sup>82</sup>

Section 30. — [PERSONS WHO MAY NEGOTIATE ORDER BILLS.] That an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.<sup>83</sup>

<sup>80</sup> See Williston on Sales, § 408.

<sup>81</sup> See Williston on Sales, § 409.

<sup>82</sup> See Williston on Sales, § 413.

<sup>83</sup> See Williston on Sales, § 414.

to communicate with the agent or agents having actual possession or control of the goods.<sup>85</sup>

**Section 33.—[INDORSEMENT OF ORDER BILL MAY BE COMPELLED IF TRANSFERRED WITHOUT.]** That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.<sup>86</sup>

**§ 1129. Warranties on negotiation or transfer of bill of lading.**

**Section 34.—[WARRANTIES IMPLIED ON NEGOTIATION OR TRANSFER OF BILL.]** That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

- (a) That the bill is genuine;
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill;
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable of fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.<sup>87</sup>

**Section 35. — [INDORSER IS NOT LIABLE FOR DEFAULT OF PREVIOUS INDORSER OR CARRIER.]** That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.<sup>88</sup>

**Section 36. — [PLEDGE OF BILL WHO RECEIVES PAYMENT OF HIS CLAIM DOES NOT WARRANT VALIDITY OF BILL OR CHARACTER OF THE GOODS.]** That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a

<sup>85</sup> See Williston on Sales, § 427.

<sup>86</sup> See Williston on Sales, § 429.

<sup>87</sup> See Williston on Sales, § 431.

<sup>88</sup> See Williston on Sales, § 433.

draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.<sup>89</sup>

§ 1130. Bona fide purchaser protected in spite of defects in the title of his vendor.

Section 37.—[WHEN TITLE OF INNOCENT PURCHASER TO ORDER BILL NOT IMPAIRED.] That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Section 38.—[A SELLER OR PLEDGOR IN POSSESSION OF ORDER BILL MAY EFFECTIVELY NEGOTIATE.] That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

§ 1131. What encumbrances on goods can be asserted against the holder of an order bill of lading; criminal offenses.

Section 39.—[LIEN OF SELLER OF GOODS OR OF STOPPAGE IN TRANSITU BY CONSIGNOR CANNOT BE ASSERTED AGAINST PURCHASER OF ORDER BILL] That where an order bill has been issued for goods no seller's

<sup>89</sup> See Williston on Sales, § 435.

lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Section 40.—[WHAT LIENS ARE VALID AGAINST HOLDER OF ORDER BILL.] That, except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Section 41.—[CRIMINAL OFFENSES.] That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States, or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely uttered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.<sup>90</sup>

<sup>90</sup> This section has been held constitutional though the forged bill in question related to no actual shipment. *United States v. Fenger*

§ 1132. Definitions, etc.

**Section 42.—[DEFINITIONS OF TERMS.]** First. That in this Act, unless the context of subject-matter otherwise requires—

“ Action ” includes counterclaim, set-off, and suit in equity.

“ Bill ” means bill of lading governed by this Act.

“ Consignee ” means the person named in the bill as the person to whom delivery of the goods is to be made.

“ Consignor ” means the person named in the bill as the person from whom the goods have been received for shipment.

“ Goods ” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“ Holder ” of a bill means a person who has both actual possession of such bill and a right of property therein.

“ Order ” means an order by indorsement on the bill.

“ Person ” includes a corporation or partnership, or two or more persons having a joint or common interest.

To “ purchase ” includes to take as mortgagee and to take as pledgee.

“ State ” includes any Territory, District, insular possession, or isthmian possession.<sup>91</sup>

§ 1133. Final sections.

**Section 43.—[THIS ACT NOT APPLICABLE TO OUTSTANDING BILLS.]** That the provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

**Section 44.—[IF PARTS ARE DECLARED UNCONSTITUTIONAL.]**

250, U. S. 199, 207, 39 S. Ct. 445, 447.

<sup>91</sup> The definition of “ State ” is not in the Uniform State Law, which contains, however, the following definitions which are not included in the Federal Act.

“ Owner ” does not include mortgagee or pledgee.

“ Purchaser ” includes mortgagee and pledgee.

“ Value ” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done “ in good faith,” within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

**TUTIONAL OTHER PARTS STAND.]** That the provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.<sup>92</sup>

**Section 45.—[TIME WHEN THE ACT TAKES EFFECT.]** That this Act shall take effect and be in force on and after the first day of January next after its passage.

**§ 1134. Additional provisions in state law.**

Three sections of the Uniform State Law which were not re-enacted in the Federal Statute are here appended.

**Section 10.—[ACCEPTANCE OF BILL INDICATES ASSENT TO ITS TERMS.]** Except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.<sup>93</sup>

**Section 40.—[FORM OF THE BILL AS INDICATING RIGHTS OF BUYER AND SELLER.]** Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods.

<sup>92</sup> This section is not in the Uniform State Law.

<sup>93</sup> See *supra*, § 90b, for the common law upon this section.

But if, except for the form of the bill, the property have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be of the purpose of securing performance by the buyer obligations under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the goods is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price of the goods, and transmits the draft and bill together to the buyer to obtain acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. However, the bill provides that the goods are deliverable to the order of the buyer, or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transaction wrongful.

**Section 41.—[DEMAND, PRESENTATION OR SIGHT DRAFT MUST BE PAID, BUT DRAFT ON MORE THAN THREE DAYS' TIME MERELY ACCEPTED, BEFORE BUYER IS ENTITLED TO THE ACCOMPANYING BILL.]**  
Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested in the goods shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.<sup>94</sup>

<sup>94</sup> At common law a time draft attached to a bill of lading indicated, in the absence of instructions that the bill of lading was to be surrendered on acceptance of the draft; but if a demand draft was thus attached the

bill of lading was not to be surrendered until the draft was paid. See *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92, 23 L. Ed. 208; *Walters v. Western R. R.*, 63 Fed. 391, 392; *Williston, Sales*, § 290.

## CHAPTER XXXIII

### BILLS OF EXCHANGE AND PROMISSORY NOTES

Law governing negotiable instruments.....	
The Uniform Negotiable Instruments Law—general rules governing form of instrument.....	
Explanation of meaning of requirements stated in the preceding section	
Possible additions or omissions.....	
When payable on demand, to order or to bearer.....	
Date of negotiable instrument.....	
Filling blanks in instruments.....	
Delivery.....	
Ambiguous instruments.....	
Signature.....	
Voidable or void signatures.....	
Consideration and value.....	
Accommodation parties.....	
How instruments are negotiated.....	
What amounts to an indorsement.....	
Partial indorsements invalid.....	
Various kinds of indorsement.....	
Restrictive and qualified indorsements.....	
Other kinds of indorsement.....	
Time and place of indorsement, etc.....	
Transfer of negotiable instrument distinguished from negotiation.....	
Reissue.....	
Who is a holder in due course.....	
Absolute and personal defences.....	
To what defences a holder in due course is subject.....	
Liability of maker, drawer or acceptor.....	
Irregular indorsers.....	
Warranties implied on negotiation.....	
Liabilities of various indorsers.....	
When presentment is necessary.....	
Day for presentment.....	
General requisites of presentment.....	
Presentment in special cases.....	
When presentment is excused or delay justified.....	
Dishonor and its effect.....	
When an instrument matures.....	
Date of maturity important for three questions.....	
In Europe an instrument is overdue for all purposes at the same time..	
When right of action accrues in the United States.....	
When an instrument is overdue for other purposes.....	
When right of action accrues on demand paper.....	

Maturity of demand paper to charge indorsers.....	1176
Domiciled notes.....	1177
Payment.....	1178
Requirement of notice, and its effect.....	1179
Form of notice.....	1180
To whom notice must be given.....	1181
Time allowed for notice.....	1182
Notice properly sent is effective though not received.....	1183
Time for charging successive parties.....	1184
Address to which must be sent.....	1185
Effect of waiver.....	1186
Excuses for failure or delay in giving notice.....	1187
Effect of notice of non-acceptance; protest.....	1188
Discharge of instrument.....	1189
Discharge of individual parties.....	1190
Effect of payment by a party secondarily liable.....	1191
Renunciation without consideration.....	1192
Unintentional cancellation and alteration.....	1193
Special rules governing bills of exchange.....	1194
What amounts to an acceptance.....	1195
General and qualified acceptances.....	1196
When presentment for acceptance is necessary.....	1197
How and when presentment for acceptance should be made.....	1198
Dishonor by non-acceptance and its effect.....	1199
Requirement of protest and its contents.....	1200
By whom, when and where protest should be made.....	1201
When protest excused; lost bill.....	1202
Nature of acceptance for honor.....	1203
Obligation incurred by acceptor for honor.....	1204
Presentment and protest of acceptance for honor.....	1205
Payment for honor.....	1206
Bills in parts or sets.....	1207
Definition of a promissory note.....	1208
Checks.....	1209
Miscellaneous provisions.....	1210

### § 1135. Law governing negotiable instruments.

A bill of exchange or a promissory note constitutes a formal contract or set of contracts. An instrument in order to come within the principles which govern the subject, must be made in conformity with certain precise rules. Otherwise it is a simple contract in writing and merely evidence of such intangible rights as may have been created by the assent of the parties. If, however, the rules are duly observed the document is itself the contract. It is a mercantile specialty.<sup>1</sup>

<sup>1</sup> See *supra*, § 221. The word that lack of consideration or value "specialty" contains no implication may not be a defence to the instrument.

A bill or note may be negotiable or non-negotiable, but it is especially in regard to negotiable bills and notes that the custom of merchants and the law based thereon becomes applicable. The custom of merchants is sometimes spoken of as if it was something distinct from the common law, but in fact the particular customs governing negotiable instruments have become part of the common law and only to the extent that customs of merchants are adopted into the common law can they have any legal importance.

Most of the principles governing negotiable instruments can be stated in the form of precise rules. Hence the subject lends itself readily to codification and it has been codified both in England and the United States. The Bills of Exchange Act which was passed in 1882, codifies the law of England; and the Uniform Negotiable Instruments Law, so called, has been enacted in almost every one of the United States.<sup>2</sup> This statute does not apply to non-negotiable bills and notes.<sup>3</sup> It does, however, apply to negotiable bonds,<sup>4</sup> for the rule of the common law denying the possibility of negotiability to an instrument under seal<sup>5</sup> has been repealed by the statute. The text of the statute is here appended as a statement of the law governing negotiable instruments. In some States variations have been made in the statute as originally drafted, and the more important of these are indicated in the notes. As the statute is intended in the main as a codification of previously existing common law, it will be construed, unless a contrary intention appears, as restating that law.

Annotations to the various sections and comment upon them will illustrate and amplify the words of the statute.

There are numerous possible personal defences (see *infra*, § 1158) and lack of consideration or value is one of them.

<sup>2</sup> It has not yet been enacted in Georgia.

<sup>3</sup> See *Windsor Cement Co. v. Thompson*, 86 Conn. 511, 86 Atl. 1; *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23.

<sup>4</sup> *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67.

<sup>5</sup> This rule had previously been broken in upon by judicial decision, holding bonds payable to bearer negotiable. *Goodwin v. Robarts*, L. R. 10 Ex. 337; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. 605.

**§ 1136. The Uniform Negotiable Instruments Law—general rules governing form of instrument.**

**TITLE I**

**NEGOTIABLE INSTRUMENTS IN GENERAL**

**ARTICLE I**

**FORM AND INTERPRETATION**

**Section 1.—[FORM OF NEGOTIABLE INSTRUMENT.]**  
**An instrument to be negotiable must conform to the following requirements:—**

(1) It must be in writing and signed by the maker or drawer;<sup>6</sup>

(2) Must contain an unconditional promise or order to pay a sum certain in money;<sup>7</sup>

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.<sup>8</sup>

<sup>6</sup> It may be signed in pencil or by mark or symbol. *Brown v. Butchers', etc., Bank*, 6 Hill, 443.

<sup>7</sup> In a few States promises to deliver a stated quantity of goods are by statute made negotiable, and in many States warehouse receipts and bills of lading (which in effect contain promises to redeliver specific bailed goods) are by statute negotiable if made out to order or bearer.

<sup>8</sup> In the Wisconsin Act the following is added to this section: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by an officer thereof or any other person, and no obligation nor

instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall, or shall be deemed to be negotiable, according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

§ 1137. Explanation of meaning of requirements stated in the preceding section.

**Section 2.—[CERTAINTY AS TO SUM; WHAT CONSTITUTES.]** The sum payable is a sum certain within the meaning of this act, although it is to be paid:—

- (1) With interest; or <sup>9</sup>
- (2) By stated instalments; or <sup>10</sup>
- (3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or <sup>11</sup>
- (4) With exchange, whether at a fixed rate or at the current rate; or
- (5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.<sup>12</sup>

**Section 3.—[WHEN PROMISE IS UNCONDITIONAL.]** An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:—

- (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or <sup>13</sup>
- (2) A statement of the transaction which gives rise to the instrument.

There can be no doubt that a mere statement of executed consideration for the instrument does not impair its negotiability.<sup>14</sup> But if the payment of a note is in terms con-

<sup>9</sup> See as to the effect of a provision diminishing the rate of interest from the date of the note if the note is paid at maturity. *Union Nat. Bank v. Mayfield*, (Okl. 1917), 169 Pac. 626.

<sup>10</sup> *First Nat. Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951.

<sup>11</sup> In the Acts of Idaho, Iowa and North Carolina the words, "Or of interest" are omitted. See *Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

<sup>12</sup> See *supra*, § 786. In Nebraska, North Carolina and South Dakota, there are express provisions that nothing in the Act shall be construed as authorizing the enforcement of a stipulation for attorney's fees.

<sup>13</sup> See *In re Boyse*, 33 Ch. D. 612; *Union Bank v. Spies*, 151 Iowa, 178, 130 N. W. 928; *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Hanna v. McCrory*, 19 N. Mex. 183, 141 Pac. 996; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053; *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886.

<sup>14</sup> *Slaughter v. Bank of Bisbee*, 17 Ariz. 484, 154 Pac. 1040; *Newbury v. Wentworth*, 218 Mass. 30, 105 N. E. 626 ("value received, per terms of

ditional on the performance of an executory promise or requested act, in consideration of which the note was given, the note seems clearly non-negotiable.<sup>14<sup>a</sup></sup> A majority of courts hold that negotiability of the instrument is not affected by the mere fact that it recites an executory consideration without any statement that payment is conditional on the subsequent performance of the executory consideration; and that such recital will not deprive the indorsee of the character of a holder in due course unless he also has notice of the breach of the executory agreement before acquiring the note, in which event he cannot recover.<sup>14<sup>b</sup></sup> A note reciting that it was given for a chattel, title to which is reserved by the payee until payment, is negotiable.<sup>14<sup>c</sup></sup>

contract"); *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643; *Merchants Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498, ("for the amount of the second instalment agreed on of a crane purchased this date"); *Waterbury-Wallace Co. v. Ivey*, 99 N. Y. Misc. 260, 163 N. Y. S. 719; *First Nat. Bank v. Sullivan*, 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913 C. 930. See also *Postal Telegraph-Cable Co. v. Citizens' Nat. Bank*, 228 Fed. 601; *Val Platz Brewing Co. v. Interstate Ice, etc. Co.*, 161 Mo. App. 531, 143 S. W. 542.

<sup>14<sup>a</sup></sup> *Equitable Trust Co. v. Harger*, 258 Ill. 615, 102 N. E. 209 (cf. *Equitable Trust Co. v. Taylor*, 146 N. Y. App. D. 424, 131 N. Y. S. 475); *Pope v. Lumber Co.*, 162 N. C. 206 76 S. E. 65. ("This note is for part of the purchase price of timber conveyed . . . by deed of even date herewith . . . and is subject to the provisions of the deed.")

<sup>14</sup> *Porter v. Steel Co.*, 122 U. S. 267, 30 L. Ed. 1210, 7 Sup. Ct. 1206; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Jennings v. Todd*, 118 Mo.

296, 24 S. W. 148, 40 Am. St. Rep. 373; *Rublee v. Davis*, 33 Neb. 779, 51 N. W. 135, 29 Am. St. Rep. 509. A few decisions hold the contrary. Thus in *Sumter County State Bank v. Hays*, 68 Fla. 473, 67 So. 109, where a negotiable note was given and indorsed by the payee to plaintiff bank and it appeared from extrinsic facts that it was given in consideration of an executory promise and the bank acquired the note with knowledge of this, but before there was a breach of the promise, it was held that the indorsee was not a holder in due course, even though the indorsee did not know of the subsequent breach. And in *Heard v. Shedden*, 113 Ga. 162, 38 S. E. 387, where the consideration was an insurance policy not yet issued, a purchaser who took the note with notice that policy had not yet been issued, was held to take the risk of possible failure of the company to issue such a policy as was applied for. See further, *infra*, § 1157, n. 44 a. See also *Sacred Heart Church Bg. Comm. v. Manson (Ala.)*, 82 So. 498; *Continental Bank &c. Co. v. Times Pub. Co.*, 142 La. 209, 76 So. 612, L. R. A. 1918 B. 632.

<sup>14<sup>c</sup></sup> *Ex parte Bledsoe*, 180 Ala. 586, 61 So. 813; *Citizen's Nat. Bank v. Buchat*,

But an order or promise to pay out of a particular fund is not unconditional.<sup>15</sup>

**Section 4.—[DETERMINABLE FUTURE TIME; WHAT CONSTITUTES.]** An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:—

- (1) At a fixed period after date or sight; or
- (2) On or before a fixed or determinable future time specified therein; or<sup>16</sup>

14 Ala. App. 511, 71 So. 82; Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214. But see Worden Grocer Co., v. Blanding, 101 Mich. 254, 126 N. W. 212, which followed the Massachusetts case (decided before the enactment of the Negotiable Instruments Law) of Sloan v. McCarty, 134 Mass. 245, holding such a note non-negotiable. See also Fleming v. Sherwood, 24 N. Dak. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945; Reynolds v. Vint, 73 Oreg. 528, 144 Pac. 526; Western Farquhar Mach. Co. v. Burnett, 82 Oreg. 174, 161 Pac. 384.

<sup>15</sup> See National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428. Such an order is in effect an assignment. See *supra*, § 425.

<sup>16</sup> See State Bank v. Bilstad, 162 Ia. 433, 136 N. W. 204, 49 L. R. A. (N. S.) 132; Des Moines Savings Bank v. Arthur, 163 Ia. 205, 143 N. W. 556, Ann. Cas. 1916 C. 498; Fisher v. O'Hanlon, 93 Neb. 529, 141 N. W. 157; Empire Nat. Bank v. High Grade Oil Ref. Co., 260 Pa. 255, 103 Atl. 602; Bright v. Offield, 81 Wash. 442, 143 Pac. 159. But cf. Pierce v. Talbot, 213 Mass. 330, 100 N. E. 553, where the court failed to give effect to what seems the natural meaning of the statute.

A note payable in five years and adding "due if ranch is sold or mortgaged" is not rendered non-negotiable

by these words, which are not self-executing, but give the holder an option. Nickell v. Bradshaw (Oreg.), 183 Pac. 12.

In speaking of provisions in notes providing for their extension at maturity, the court in Cedar Rapids Nat. Bank v. Weber, 180 Iowa, 966, 164 N. W. 233, 235, L. R. A. 1918 A. 432, after citing numerous decisions, said: "We gather from the great weight of authority that, where the provision of the note amounts to an agreement by the parties to the note for an extension to an indefinite time, the negotiability of the instrument is thereby destroyed. The language of the note in suit contains a provision by which the maker, payee, sureties, indorsers, and guarantors consent to an extension of time of payment. This language is binding upon the payee, the holder, and the maker. If the maker demands an extension of time, by the terms of the instrument the payee has consented thereto. The failure of the parties to fix a time to which the payment might be extended renders the same uncertain. The language used is not susceptible of any other interpretation. Certainty is required by the Negotiable Instruments Law, and by the exigencies and usages of commercial business. While the rule adopted by the Supreme Court of New Mexico, and possibly in some other jurisdictions, although none of the other cases cited *supra* so

(3) On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.<sup>17</sup>

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.<sup>18</sup>

hold, is *contra*, we believe that the language and spirit of the statute can be applied in the case at bar only by holding the instruments in question uncertain as to the time of payment and non-negotiable.

"The conflict in the holdings of the several courts in the several cases cited is more apparent than real. In most of them in which the note was held negotiable it was quite apparent that the language used was not sufficient to make out a binding obligation upon the payee or holder to grant an extension."

<sup>17</sup> Thus a note payable a fixed time after death of a named person may be negotiable. *McClenathan v. Davis*, 149 Ill. App. 654; *Keeler v. Hiles' Est.* (Neb.), 172 N. W. 363. Otherwise of a note payable a fixed time after an event not certain to happen. *Rice v. Rice*, 43 N. Y. App. Div. 458, 60 N. Y. S. 97. It has been held by two courts that a note containing a stipulation that the indorsers thereon consent to an extension of time of maturity prevents negotiability. *Union Stock Yards Nat. Bank v. Bolan*, 14 Ida. 87, 93 Pac. 508, 125 Am. St. Rep. 146; *Roseville State Bank v. Heslet*, 84 Kans. 315, 33 L. R. A. (N. S.) 738. The contrary decisions, however, seem clearly sound, *Longmont Nat. Bank v. Loukonen*, 53 Col. 489, 127 Pac. 947, Ann. Cas. 1914 B. 208; *Stitzel v. Miller*, 157 Ill. App. 390; *Farmer v. Bank of Graettinger*, 130 Ia. 469, 107 N. W. 170; *First Nat. Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878; *DeGroat v. Focht*, 37 Okl. 267, 131 Pac. 172; since the

stipulation does not of itself change the date of maturity in the instrument.

A stipulation permitting the holder to enter judgment whether a note is due or not, has been held to make uncertain its time of maturity. *Volk v. Shoemaker*, 229 Pa. 407, 78 Atl. 933; *First Nat. Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913 A. 203; *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678. See also *Iowa Nat. Bank v. Carter*, 144 Ia. 715, 123 N. W. 237 (*cf.* *Des Moines Sav. Bank v. Arthur*, 163 Ia. 205, 143 N. W. 556, Ann. Cas. 1916 C. 498); *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912 D. 1; *Reynolds v. Vint*, 73 Oreg. 528, 144 Pac. 526; *Western Farquhar Mach. Co. v. Burnett*, 82 Oreg. 174, 161 Pac. 384; *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870. Even such a note, however, seems within the broad language of the Statute since it is payable "before a fixed . . . future time," and apart from the implied prohibition in Sec. 5 (2) of a stipulation allowing confession of judgment before maturity, might be thought to be negotiable. See *Smith v. Nelson Land &c. Co.*, 212 Fed. 56, 128 C. C. A. 512; *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

<sup>18</sup> See *Berenson v. London, etc., Ins. Co.*, 201 Mass. 172, 87 N. E. 687; *Tisdale Lumber Co. v. Piquet*, 153 N. Y. App. Div. 266, 137 N. Y. S. 1021. In the Wisconsin Act instead of the last paragraph, the following

§ 1138. Possible additions or omissions.

**Section 5.—[ADDITIONAL PROVISIONS NOT AFFECTING NEGOTIABILITY.]** An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.<sup>19</sup> But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:—

(1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or <sup>20</sup>

(2) Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) Waives the benefit of any law intended for the advantage or protection of the obligor; or

(4) Gives the holder an election to require something to be done in lieu of payment of money.<sup>21</sup>

But nothing in this section shall validate any provision or stipulation otherwise illegal.<sup>22</sup>

is inserted: “(4) At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided.”

<sup>19</sup> *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828 (*Cf.* *National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479); *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

<sup>20</sup> Provisions in collateral notes by which the maker engages to deposit additional collateral, have been held to destroy negotiability. *Holliday State Bank v. Hoffman*, 85 Kans. 71, 35 L. R. A. (N. S.) 390; *Hibernia Bank v. Dresser*, 132 La. Ann. 532, 61 So. 561; *Empire Nat. Bank v. High Grade Oil Ref. Co.*, 260 Pa. 255, 103 Atl. 602. Contrary decisions are: *Kobey v. Hoffman*, 229 Fed. 486, 143 C. C. A. 554; *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915 F. 777. See also *Kennedy v. Brod-*

*erick*, 216 Fed. 137, 132 C. C. A. 381; On the one hand it seems clear that there is an additional promise in such a note, but on the other hand it may be urged that the promise is subsidiary and in aid of the object of securing payment at maturity.

<sup>21</sup> *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661.

<sup>22</sup> In the Illinois Act, the words “under this Act,” are added at the end of the first sentence. The effect of this insertion is that the peculiar law previously in force in Illinois allowing negotiability to promises for the delivery of other things than money still remains in force after the enactment of the Negotiable Instruments Law. In the Illinois Act, also the words “if the instrument be not paid at maturity,” are omitted from subsection (2). In the Kentucky Act subsection (3) is omitted. In the Wisconsin Act the words: “or authorize the waiver of exemptions from execution,” are added at the end of the section.

**Section 6.—[OMISSIONS; SEAL; PARTICULAR MONEY.]** The validity and negotiable character of an instrument are not effected by the fact that:—

- (1) It is not dated; or <sup>23</sup>
- (2) Does not specify the value given, or that any value has been given therefor; or
- (3) Does not specify the place where it is drawn or the place where it is payable; or
- (4) Bears a seal; or
- (5) Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.<sup>24</sup>

<sup>23</sup> *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756; *Church v. Stevens*, 56 N. Y. Misc. 572, 107 N. Y. S. 310.

<sup>24</sup> In the Illinois Act the following words are inserted at the beginning of subsection (5): "Is payable in current funds: or," and that Act also does not contain the final paragraph of the section. Prior to the passage of the Negotiable Instruments Law there was considerable litigation on the question whether an instrument payable in currency or in current funds was negotiable. Some courts held that currency or current funds meant the money or legal tender that was current, and therefore, that the instrument was negotiable. *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. Ed. 97, 8 Sup. Ct. 62, *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908; *Keith v. Jones*, 9 Johns. 120. Other courts held that currency or current funds meant, what was current as money (that is, used as such) whether, in fact, it was money or not. *Huse v. Hamblin*, 29 Iowa, 501. The former meaning is supported by the weight of authority, but this is probably due chiefly to the unfortunate practical consequences of

a contrary holding, for the latter meaning seems the true sense of the words, and under that meaning if it is requisite that a negotiable instrument shall be payable in money, an instrument payable in currency or current funds is not negotiable. *Wright v. Hart's Adm.*, 44 Pa. 454. It is probable that the Negotiable Instruments Law was meant to settle this controversy when it provided that an instrument is negotiable though it designates a particular kind of current money in which payment is to be made. But it cannot be said that those words do settle the controversy. Undoubtedly a note payable in a particular kind of current money, *e. g.*, gold coin, is negotiable; *Chrysler v. Renois*, 43 N. Y. 209; but the words "current money" do not seem the equivalent of "currency or current funds," if the latter words are understood to mean what is used as money whether it is really money or not. The Supreme Court of Iowa, indeed, following earlier authorities, has held that a check payable in current funds is not payable in money and is therefore not negotiable. *Dille v. White*, 132 Ia. 327, 109 N. W. 909,

§ 1139. When payable on demand, to order, or to be

**Section 7.—(WHEN PAYABLE ON DEMAND.)**  
 instrument is payable on demand—(1) Where it is expressed to be payable on demand or at sight, or on presentation;  
 (2) In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

An instrument payable “on demand after date” is payable on demand.<sup>26</sup>

**Section 8.—[WHEN PAYABLE TO ORDER.]** 1  
 instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order; or it may be drawn payable to the order of:

- (1) A payee who is not maker, drawer, or drawee;
- (2) The drawer or maker; or
- (3) The drawee; or
- (4) Two or more payees jointly; or
- (5) One or some of several payees; or <sup>27</sup>
- (6) The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.<sup>28</sup>

10 L. R. A. (N. S.) 510. Contrary decisions under the statute are: *Millikan v. Security Trust Co.*, (Ind. 1918), 118 N. E. 568; *Merchants' Nat. Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. D. 248, 147 N. Y. S. 498. The amendment in Illinois makes the matter clear and might well be adopted elsewhere.

<sup>26</sup> By the common law a sight-draft was entitled to three days of grace, Daniel, *Neg. Inst.*, § 617; a demand draft was not. The Negotiable Instruments Law by abolishing days of grace (section 85) destroys any distinction between demand paper and sight paper, and therefore classifies sight paper as a kind of demand

paper. By amendment to the statute, however, in Massachusetts, Hampshire and North Carolina, a sight draft with days of grace has been restored as a separate instrument.

<sup>27</sup> *O'Neil v. Magner*, 81 C. 22 Pac. 876; *Fenno v. Gay*, 14 118, 15 N. E. 87; *Schlesinger v. Schultz*, 110 N. Y. App. D. N. Y. S. 383. But see *Hart v. Dixon*, 77 N. Y. App. D. 241, 7 N. Y. S. 1061.

<sup>28</sup> See *supra*, § 325.

<sup>29</sup> In the Illinois Act after section (6) is inserted: “(7) Where an instrument payable to the order of a deceased person shall be

**Section 9.—[WHEN PAYABLE TO BEARER.]** The instrument is payable to bearer:

- (1) When it is expressed to be so payable; or
- (2) When it is payable to a person named therein or bearer; or
- (3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
- (4) When the name of the payee does not purport to be the name of any person; or
- (5) When the only or last indorsement is an indorsement in blank.<sup>29</sup>

The English Statute does not contain the words in subsection three of the American section nine—"and such fact was known to the person making it so payable;" and under the English cases the drawer's ignorance of the fiction is immaterial.<sup>30</sup> But if the drawer intends the instrument to be payable to a real person of the name stated in the instrument the further fact that the payee so named had no interest in the instrument will not make the instrument payable to bearer.<sup>31</sup> In the United States prior to the enactment of the Negotiable Instruments Law, the decisions had held that knowledge by the drawer of the fiction was essential in order

payable to the order of the administrator or executor of his estate." The final sentence of the section seems to qualify the general statement in Sec. 14, so far as concerns the filling in of a blank left for the name of the payee in an instrument payable to order. See *Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010. The English Bills of Exchange Act makes paper in legal effect payable to order, though the word *order* is not contained therein, unless words prohibiting transfer are contained in the instrument. This change of the common law was not adopted in the American Statute.

<sup>29</sup> In the Illinois Act subsections (3) and (5) are as follows: "(3) When

it is payable to the order of a person known by the drawer or maker to be fictitious or nonexistent, or of a living person not intended to have any interest in it." "(5) When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

<sup>30</sup> *Clutton v. Attenborough* [1897] A. C. 90.

<sup>31</sup> *Vinden v. Hughes* [1905] 1 K. B. 795; *North & South Wales Bank v. Macbeth*, [1908] A. C. 137; *Town, etc., Co. v. Provincial Bank*, [1917] 2 Ir. Rep. 421. See also *Vagliano v. Bank of England*, 23 Q. B. D. 243; *Bank of England v. Vagliano*, [1891] A. C. 107.

to make the instrument payable to bearer,<sup>32</sup> and under the statute the same requirement is preserved.<sup>33</sup>

**Section 10.—[TERMS WHEN SUFFICIENT.]** The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

**§ 1140. Date of negotiable instrument.**

**Section 11.—[DATE, PRESUMPTION AS TO.]** Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

**Section 12.—[ANTE-DATED AND POST-DATED.]** The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.<sup>34</sup>

<sup>32</sup> *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Jordan v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; *Shipman v. Bank of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Armstrong v. National Bank*, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778. 54 Am. St. Rep. 863.

<sup>33</sup> *Los Angeles Inv. Co. v. Home Sav. Bank (Cal.)*, 182 Pac. 293; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499; *Egner v. Corn Exchange Nat. Bank*, 42 N. Y. Misc. 552, 86 N. Y. S. 107; *Jones v. People's Bank Co.*, 95 Ohio, 253, 116 N. E. 34; *Weishaas v. Pendleton*, 73 Oreg. 190, 144 Pac. 401. As to what is a fictitious payee, see *United States v. Chase Nat. Bank*, 250 Fed. 105, 162 C.

C. A. 277; *Sockland v. Storch*, 123 Ark. 253, 185 S. W. 262, Ann. Cass. 1918 A. 668, 250; *Bartlett v. First Nat. Bank*, 247 Ill. 490, 93 N. E. 337; *Jordan v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) Trust Company of Am. v. Hamilton Bank, 127 N. Y. App. D. 515, 112 N. Y. S. 84; *Hartford v. Greenwich Bank*, 157 N. Y. App. D. 448, 142 N. Y. S. 387, 215 N. Y. 726, 109 N. E. 1077; *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 78 Atl. 876, 128 Am. St. Rep. 780; *Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank*, 134 Tenn. 379, 183 S. W. 1006.

<sup>34</sup> A post-dated instrument may be negotiated before its date, and one who so takes it for value and in good faith is not thereby put on inquiry and is a holder in due course. *Triphonoff v. Sweeney*, 65 Oreg. 299, 130 Pac. 979; *Albert v. Hoffman*, 64 N. Y. Misc. 87, 117 N. Y. S. 1043. See also *Royal*

**Section 13.—[WHEN DATE MAY BE INSERTED.]**  
Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.<sup>35</sup>

**§ 1141. Filling blanks in instruments.**

**Section 14.—[BLANKS; WHEN MAY BE FILLED.]**  
Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.<sup>36</sup>

*Bank v. Tottenham*, [1894] 2 Q. B. 715; *Hitchcock v. Edwards*, 60 L. T. 636; *American Agricultural Chem. Co. v. Scrimger*, 130 Md. 389, 100 Atl. 774, L. R. A. 1917 F. 394. But a bank which pays before its date a post-dated check drawn by a depositor, is acting without authority, and will be liable to its customer if it dishonors other checks drawn by him presented before the date of the post-dated check, if there would have been sufficient funds

had the post-dated check not been paid. *Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151, 68 S. E. 1031.

<sup>35</sup> See *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756; *Holman v. Higgins*, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916 F. 1263, Ann. Cas. 1917 E. 515.

<sup>36</sup> In the Illinois Act the words "issued or" are inserted before "negotiated" in the last sentence. In the Wisconsin Act the words "prior to

The right given by this section where an instrument is wanting "in any material particular" covers a case where an instrument wanting in many material particulars is made complete in form,<sup>36a</sup> and the right is not confined to the filling of such blanks as may be necessary to make the paper a negotiable instrument, but includes the filling of any blank with appropriate words.<sup>37</sup> Prior to the passage of the Negotiable Instruments Law it was open to question in the United States whether a purchaser in good faith of an incomplete instrument might not recover if he filled out the note in accordance with the statement of authority made by the person from whom he bought the instrument even though such statement was false. There is no doubt, however, now, that the purchaser must find out at his peril the authority of the person in possession of the incomplete instrument.<sup>38</sup> On the other hand, if the instrument is completed though fraudulently and without authority, the statute makes it clear that a holder in due course may recover.<sup>39</sup> The case where the holder takes the instrument after the blanks have been filled in but knowing there had been blanks is not expressly covered by the statute. So far as the decisions go, however, they seem to indicate that the purchaser knowing of the previous existence of blanks is bound at his peril to ascertain the limits of his authority to fill them in.<sup>40</sup>

This seems an undesirable result, and one not required by

negotiation" are inserted before the words "by filling;" and the words "prima facie" in the middle of the section are omitted.

<sup>36a</sup> *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997.

<sup>37</sup> *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 477 ("four months" inserted in a blank before "after date").

<sup>38</sup> *Herdman v. Wheeler*, [1902] 1 K. B. 361 (cp. *Lloyds Bank v. Cooke*, [1907] 1 K. B. 794); *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 112 N. W. 236, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275; *In re Philpott's Est.*, 169 Ia. 555, 151 N. W. 825, Ann. Cas.

1917 B. 839; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. 426; *Stone v. Sargent*, 220 Mass. 445, 107 N. E. 1014; *Hartington Nat. Bank v. Breslin*, 88 Neb. 47, 128 N. W. 659; *Hunter v. Allen*, 127 N. Y. App. Div. 572, 111 N. Y. S. 820; *Equitable Trust Co. v. Lyons*, 72 N. Y. Misc. 49, 129 N. Y. S. 79.

<sup>39</sup> See, e.g., *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957.

<sup>40</sup> *Smith v. Prosser*, [1907] 2 K. B. 735; *Dunbrow v. Gill*, 130 N. Y. S. 182, 72 N. Y. Misc. 400. Cf. *Business Men's League v. Sragow*, 153 N. Y. S. 231.

the words of the statute. The purchaser is justified in supposing that whoever filled the blank had authority to fill it as he did, since the statute gave the person in possession of the instrument *prima facie* authority to fill the blanks. Therefore the purchaser may well come within the statutory definition of a holder in due course.

The statute limits the authority of the holder to fill in a blank to a reasonable time,<sup>41</sup> but unless circumstances have made it inequitable, the writing may be reformed after the lapse of a reasonable time, so that it shall express the intention of the parties.<sup>42</sup> When the authority has once been exercised by filling in the blanks it has been held that even before negotiation of the instrument by the person authorized, an alteration of the words filled in is unauthorized and avoids the instrument.<sup>43</sup>

#### § 1142. Delivery.

**Section 15.—[INCOMPLETE INSTRUMENT NOT DELIVERED.]** Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.<sup>44</sup>

<sup>41</sup> See *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 477.

<sup>42</sup> *Farmers' L. & T. Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70.

<sup>43</sup> *First Nat. Bank v. Wood*, 109 S. C. 70, 95 S. E. 140. Two judges dissented, and the decision is criticised in 18 Col. L. Rev. 606, 27 Yale L. J. 951. It is opposed to the decision, made under the common law, of *Douglass v. Scott*, 8 Leigh, 43.

<sup>44</sup> This section (which is not in the English Statute) was presumably based on *Baxendale v. Bennett*, 3 Q. B. D. 525, which holds that a bona fide purchaser for value could not recover from one from whose possession a bill which he had accepted in blank had been stolen. To the same effect is

the case of *Linick v. Nutting*, 140 N. Y. App. Div. 265, 125 N. Y. S. 93 where a check signed in blank was stolen, the blanks filled, and the check negotiated to a holder in due course. In *Baxendale v. Bennett*, there seems to have been negligence, but Bramwell, L. J., drew the distinction that "the defendant here has not voluntarily put into any one's hands the means, or part of the means for committing a crime." Under the American statute also, one who signs a number of blank checks and leaves them, however carelessly, in an unlocked drawer will apparently not be liable even to a holder in due course. One who entrusts such checks to another even though merely for safe-keeping, however, will be liable if the

**Section 16.—[DELIVERY: WHEN EFFECTUAL: WHEN PRESUMED.]** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.<sup>45</sup>

This section changes the rule of the common law in providing that as against a holder in due course lack of delivery is no defence.<sup>46</sup> But as between the immediate parties or those having the same rights, it may be shown that there was no intention to transfer the property in a note made payable to the person to whom its possession was delivered, or to do so only upon a condition which has not happened.<sup>47</sup> A payee

checks are filled out and negotiated to a holder in due course; for delivery is defined in the statute (section 191) as any transfer of possession. See further on this section: *Polizzotto v. People's Bank*, 125 La. 770, 51 So. 843, 30 L. R. A. (N. S.) 206; *Holtzman v. Teague*, 172 N. Y. App. D. 75, 158 N. Y. S. 211; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

<sup>45</sup> In the North Carolina Act the word "accepting" is omitted from the second sentence. In the Kansas and South Dakota Acts, the third sentence of the section is omitted, and in the latter a substituted provision is inserted. An executed note not delivered

found among the maker's effects after his death creates no obligation. *In re Bean's Est.* (Pa.), 107 Atl. 671.

<sup>46</sup> See *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923; *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67; *Schaeffer v. Marsh*, 90 N. Y. Misc. 307, 153 N. Y. S. 96.

<sup>47</sup> *Jenkins v. National Bank* (Md.), 106 Atl. 174; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105; *Lee v. Benjamin*, 40 R. I. 567, 102 Atl. 713; *Seattle Nat. Bank v. Becker*, 74 Wash. 431, 133 Pac. 613; *United States Ins. Co. v. Epley*, 164 Wis. 438, 160 N. W. 175.

who takes for value in good faith is not an immediate party within the meaning of the section.<sup>48</sup>

**§ 1143. Ambiguous instruments.**

**Section 17.—[CONSTRUCTION WHERE INSTRUMENT IS AMBIGUOUS.]** Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

(1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

(2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

(3) Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

(4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

(5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

(6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;<sup>49</sup>

(7) Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.<sup>50</sup>

<sup>48</sup> *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915 B. 144. See *infra*, § 1157; also *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, L. R. A. 1915 F. 1155.

<sup>49</sup> See *Iron City Nat. Bank v. Rafferty*, 207 Pa. 238, 56 Atl. 445; *Moore v. Carey*, 138 Tenn. 332, 197 S. W. 1093, L. R. A. 1918 D. 963; *Germania*

*Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

<sup>50</sup> See *Lewenstein v. Forman*, 223 Mass. 325, 111 N. E. 962, also *supra*, § 324. In the North Carolina Act, subsection (2) is omitted. In the Wisconsin Act is added: "(8) Where several writings are executed at or about the same time, as parts of the

§ 1144. Signature.

**Section 18.—[LIABILITY OF PERSON SIGNING IN TRADE OR ASSUMED NAME.]** No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.<sup>51</sup>

**Section 19.—[SIGNATURE BY AGENT; AUTHORITY; HOW SHOWN.]** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.<sup>52</sup>

**Section 20.—[LIABILITY OF PERSON SIGNING AS AGENT, ETC.]** Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.<sup>53</sup>

The purpose of this section seems to be to change (if the signer was duly authorized and his principal disclosed on the instrument) the law by which signatures of those who sign in a representative character have been held in many cases to bind the signers personally even though they were authorized to sign on behalf of another,<sup>54</sup> and the courts seem generally disposed to construe the section as effecting this change.<sup>55</sup>

same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

<sup>51</sup> See *First Nat. Bank v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582; *New York L. Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 121 Am. St. 362; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. 1064.

<sup>52</sup> See *In re Chismore's Est.*, 166 Ia. 217, 147 N. W. 297; *Grant County*

*State Bank v. Northwestern Land Co.*, 28 N. Dak. 479, 150 N. W. 736. In the Kentucky Act instead of this section it is provided that: "The signature of any party may be made by an agent duly authorized in writing." See *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915 F. 777.

<sup>53</sup> In the Virginia Act after the word "capacity" the words "without disclosing his principal" are inserted.

<sup>54</sup> See *supra*, §§ 298, 299, 311, 312.

<sup>55</sup> *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878; *Chelsea Exch. Bank v.*

The words "if he was duly authorized" seem to carry the implication that if unauthorized the agent is not merely liable for breach of a non-negotiable warranty,<sup>56</sup> but liable on the instrument itself.<sup>57</sup>

**Section 21.—[SIGNATURE BY PROCURATION; EFFECT OF.]** A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.<sup>58</sup>

**§ 1145. Voidable or void signatures.**

**Section 22.—[EFFECT OF INDORSEMENT BY INFANT OR CORPORATION.]** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.<sup>59</sup>

This provision presumably does not change the rule of the common law. It is not stated whether or not the transfer of the instrument may be rescinded by the corporation or infant, but in view of Section 196 of the statute the infant doubtless still retains his right of rescission.<sup>60</sup>

First &c. Church, 89 Misc. 616, 152 N. Y. S. 201; Chatham Nat. Bank v. Gardner, 31 Pa. Super. 135; Wilson v. Clinton Chapel, 138 Tenn. 398, 198 S. W. 244; Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 123 Pac. 593. But see Briel v. Exchange Nat. Bank, 172 Ala. 475, 55 So. 808; Schumacher v. Dolan, 154 Ia. 207, 134 N. W. 624; Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811, 27 Yale L. J. 686.

<sup>56</sup> See *supra*, § 282; Miller v. Reynolds, 92 Hun, 400.

<sup>57</sup> Jump v. Sparling, 218 Mass. 324, 326, 105 N. E. 878. See also Daniel v. Glidden, 38 Wash. 556, 563, 80 Pac. 811, 813; Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 451, 123 Pac. 593, 594. Cf. Riordan v. Thornsby, 178 Ky. 324, 198 S. W. 920; Phelps v. Weber,

84 N. J. L. 630, 87 Atl. 469; Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738; Birmingham Iron Foundry v. Regnery, 33 Pa. Super. 54, 27 Yale L. J. 686.

<sup>58</sup> See Bryant v. Banque du Peuple, [1893] A. C. 170; Morison v. London &c. Bank, [1914] 3 K. B. 356.

<sup>59</sup> In North Carolina the words "or married woman" are inserted after the word infant.

<sup>60</sup> This was so held in Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917 B. 1172. In Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, it was suggested, prior to the enactment of the statute, that an infant's indorsement was void. The statute at least makes it clear that the indorsement of an infant or of a corporation acting *ultra vires* is not absolutely void.

**Section 23.—[FORGED SIGNATURE; EFFECT OF.]**

When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Whether a forgery can subsequently be ratified or adopted without estoppel or new consideration is a question to which judicial answers are hopelessly conflicting. It is pointed out that since the forgery did not purport to be made on behalf of the person whose name was forged, there can be no ratification. This criticism is sound. The person whose signature it is may indeed adopt it, but adoption involves no fictitious relation, and to sustain recovery after adoption either consideration or estoppel should be requisite.<sup>61</sup> Called by whatever name the doctrine may be, the vital question is whether the enforcement of the instrument without this basis should be permitted.<sup>62</sup>

The right of recovery is clear not only when consideration

<sup>61</sup> See *Capps v. Hensley*, 23 Okl. 311, 100 Pac. 515; *Edwards v. Heralds of Liberty*, 263 Pa. 548, 107 Atl. 324.

<sup>62</sup> Enforcement was allowed in *Union Bank v. Middlebrook*, 33 Conn. 95; *Livingston v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Fay v. Slaughter*, 194 Ill. 157, 167, 62 N. E. 592, 56 L. R. A. 564, 88 Am. St. Rep. 148; *Casco Bank v. Keene*, 53 Me. 103; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Central Bank v. Copp*, 184 Mass. 328, 68 N. E. 334; *Fitzpatrick v. School Commrs.*, 7 Humph. 224, 46 Am. Dec. 76; *Marks v. Schram*, 109 Wis. 452, 84 N. W. 830. See also *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134; *Ofenstein v. Bryan*, 20 App. D. C. 1; *Smith v. Tramel*, 68 Ia. 488, 27 N. W.

471; *Myer v. Wegener*, 114 Ia. 74, 86 N. W. 49; *Carthage Bank v. Butterbaugh*, 116 Ia. 657, 88 N. W. 954; *Forsythe v. Bonta*, 5 Bush, 547. On the other hand, the adoption was held invalid in *Brook v. Hook*, L. R. 6 Ex. 89; *Barry v. Kirkland*, 6 Ariz. 1, 52 Pac. 771; *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613 (but see *Neal v. First Bank*, 26 Ind. App. 503); *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754; *Workman v. Wright*, 33 Oh. St. 405, 31 Am. Rep. 546; *McHugh v. County of Schuylkill*, 67 Pa. 391, 5 Am. Rep. 445; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702; *Henry, etc., Assoc. v. Walton*, 181 Pa. 201, 37 Atl. 261.

is given, but also when the acknowledgement of the forged signature takes place before the purchase of the instrument in question, and is an inducement to such purchase. Here there is an assertion of fact and an estoppel to deny it.<sup>63</sup>

Other circumstances besides the purchase of the forged instrument on the faith of a representation may afford ground for an estoppel. Thus where a customer of a bank has negligently failed for a long period to examine cancelled checks and discover a forgery, as he would have by such examination, he is estopped afterwards to assert his claim against the bank which has been deprived of the means to protect itself by recovery over against another.<sup>64</sup> Under the statute "precluded" perhaps fairly implies that something in the nature of an estoppel is necessary.<sup>65</sup>

## § 1146. Consideration and value.

### ARTICLE II

#### CONSIDERATION

**Section 24.—[PRESUMPTION OF CONSIDERATION.]** Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.<sup>66</sup>

<sup>63</sup> As to the circumstances sufficient to create an estoppel, see *Terry v. Bissell*, 26 Conn. 23, 41; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923, 36 L. R. A. 539, 57 Am. St. Rep. 458; *Crout v. DeWolf*, 1 R. I. 393; *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203.

<sup>64</sup> *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811, 6 Sup. Ct. 657; *California Vegetable Union v. Crocker Nat. Bank*, (Calif. 1918), 174 Pac. 920. Cf. *Hamlin's Wizard Oil Co. v. United States Express Co.*, 265 Ill. 156, 106

N. E. 623, and see 32 Harv. L. Rev. 287.

<sup>65</sup> See *Catskill Nat. Bank v. Lasher*, 84 N. Y. Misc. 523, 147 N. Y. S. 641; *Gluckman v. Darling*, 85 N. J. L. 457, 89 Atl. 1016; *Olsgard v. Lemke*, 32 N. Dak. 551, 156 N. W. 102; *Denison v. Gholson Dry Goods Co.*, 135 Tenn. 60, 185 S. W. 723.

<sup>66</sup> A renewal note is no more binding than the original note if that was not supported by valuable consideration. *Seager v. Drayton*, 217 Mass. 571, 105 N. E. 461, and see *supra*, § 115.

In this and the following sections the statute includes with identical treatment two questions not previously regarded as identical by the common law:—

(1) How far consideration is necessary to support the several promises on negotiable instruments; and when consideration is necessary what is its essence?

(2) What “value” must be given by the transferee of an instrument in order to constitute him a purchaser for value, or holder in due course?

The law prior to the statute was perfectly clear in regard to the first question. Between immediate parties the same kind of consideration was necessary as is essential to support any contractual promise.<sup>67</sup> On the second question, however, the law was in conflict as will appear from the comment on the following section of the statute.

**Section 25.—[CONSIDERATION, WHAT CONSTITUTES.]** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.<sup>68</sup>

An obvious purpose of this section was to settle the conflict of decisions in regard to the value essential to constitute a transferee a purchaser for value or holder in due course. Prior to the enactment of the statute it was held in New York that one to whom negotiable paper was transferred either in payment of, or as security for an antecedent debt was not a purchaser for value; and a minority of States followed this rule, especially where the instrument was given only for security.<sup>69</sup> The statute clearly adopts the rule of the greater number of

<sup>67</sup> See *supra*, § 108.

<sup>68</sup> See *supra*, § 108. In the Wisconsin Act the words “discharged, extinguished or extended” are inserted after the word “debt,” and at the end of the section is added: “But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agree-

ment at the time of delivery, by the maker, does not constitute value.” The definition of value in the Negotiable Instruments Law is adopted in substance in the subsequent Uniform Commercial Acts on Sales, Bills of Lading and Warehouse Receipts.

<sup>69</sup> See 1 Ames, Bill and Notes, 650, n. 667 n.; Daniel Neg. Inst., §§ 184, 820.

courts prior to its enactment so far as concerns the discharge of an antecedent debt,<sup>69</sup> and though it is not clearly stated that taking as security for an antecedent debt is also giving value, where neither extension nor forbearance is promised by the creditor, the decisions under the statute seem to treat a transferee as giving value regardless of whether he takes the instrument in payment of, or as security for an antecedent debt.<sup>70</sup>

If, however, the same rule is to be applied to the enforcement of the promises between immediate parties to an instrument, a note given as security for the unmatured debt of another, or an indorsement on the unmatured note of another after its discount by the holder, is supported by sufficient consideration—a result certainly at variance with the law as it existed before the enactment of the statute.<sup>71</sup> Whether the courts will accept this conclusion is perhaps not yet wholly clear, but from such decisions as have been made it seems very unlikely.<sup>72</sup>

<sup>69</sup> The New York Court of Appeals recognizes this change in the law of New York. *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

<sup>70</sup> *Scherer v. Everest*, 168 Fed. 822, 94 C. C. A. 346; *Melton v. Pensacola Bank*, 190 Fed. 126, 111 C. C. A. 166; *Vogler v. Manson*, (Ala. 1917), 76 So. 117; *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 So. 129; *Voss v. Chamberlain*, 139 Ia. 569, 179 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331; *State Bank v. Bilsted*, 162 Ia. 433, 136 N. W. 204, 49 L. R. A. (N. S.) 132; *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1; *Burnes v. New Mineral Fertilizer Co.*, 218 Mass. 300, 105 N. E. 1074; *Graham v. Smith*, 155 Mich. 65, 118 N. W. 726; *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643; *First Nat. Bank v. McGrath*, 111 Miss. 872, 72 So. 701; *Central Bank v. Lyda*, (Mo. App. 1916), 191 S. W. 245; *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364; *King v.*

*Bowling Green Trust Co.*, 145 N. Y. App. Div. 398, 402, 129 N. Y. S. 977. *Brewster v. Shrader*, 26 N. Y. Misc. 480, 57 N. Y. S. 606; *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Smathers v. Toxaway Hotel Co.*, 162 N. C. 346, 78 S. E. 224; *Second Nat. Bank v. Werner*, 19 N. Dak. 485, 126 N. W. 100; *Crane v. Hall* (Tenn.), 213 S. W. 414; *Helper State Bank v. Jackson*, 48 Utah, 430, 160 Pac. 287; *American Bank v. McComb*, 105 Va. 473, 54 S. E. 14; *German-American Bank v. Wright*, 85 Wash. 460, 145 Pac. 769, Ann. Cas. 1917 D. 381. For the cases deciding whether taking chattel property as payment or security for an antecedent debt is a taking for value, see Williston, Sales, § 620.

<sup>71</sup> See *supra*, § 108.

<sup>72</sup> In the following cases where the Negotiable Instruments Law was applicable, the promise was held *nudum pactum*. *Zadek v. Forcheimer*, (Ala. App. 1918), 77 So. 941; *American Multigraph Sales Co. v. Grant*, 135

Whatever may ultimately be decided where the debtor merely accepts an instrument or signature as security for an agreement to forbear or to extend the time of payment, the debt of another is unquestionably sufficient consideration to support a promise on a negotiable instrument,<sup>73</sup> and it would be sufficient to support an informal promise;

Minn. 208, 160 N. W. 676; *Schaus v. Henry*, 89 N. J. L. 607, 99 Atl. 188; *Roseman v. Mahony*, 86 N. Y. App. D. 377, 83 N. Y. S. 749; *Rogowski v. Brill*, 131 N. Y. S. 589; *Wetmore & Morse Granite Co. v. Ryle* (Vt.), 107 Atl. 109. In *Holmes v. Webb*, 166 Wis. 280, *s. c. sub nom. Holmes v. Wisconsin Grain &c. Co.*, 164 N. W. 1007, though a majority of the court held that lack of consideration had not been proved since it did not appear that the antecedent debt had not been extended, they implied that otherwise recovery could not be allowed. The words of the Wisconsin statute, however, differ from the standard form of the Uniform Law.

In *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436, a note signed by husband and wife for an antecedent debt due from the husband, which had been discharged in insolvency, was held without consideration as against the wife, the court saying, at page 132: "A wife's note, given to a third person in payment of her husband's debt, is for a valuable consideration; but a note given as security for such a debt, previously existing, is not. To make a note of the latter kind valid there must be a new consideration." The Negotiable Instruments Law though then recently enacted and applicable to the case was not cited.

In *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1, a subsequent note given as security for an earlier indebtedness was enforced but there was clear consideration for the later note in a promise of forbearance by the

creditor. Thus the distinction in the previous case was obvious. The court made the unnecessary statement that in *Widger v. Baxter*, 130, 76 N. E. 509, 3 L. R. A. 436, "there was no preëxisting debt in existence when the wife's note was given."

In *Neal v. Wilson*, 213 Mass. 100, 100 N. E. 544, a check was held to make good an overdraft of a bank on a person and the drawer of the check was held liable. Here the consideration was clearly given in satisfaction of an antecedent debt not merely as security for it, but the court said: "The defendant for the accommodation of the debtor and without consideration of his note or check to a creditor in payment of or as security for the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. That is the rule in the negotiable instruments act, c. 73, § 46), which governs the case." The negotiable instruments act in regard is a codification of the law." A similar statement was made in the case of *Seager v. Drake*, 190 Mass. 571, 105 N. E. 461.

<sup>73</sup> *Russell Electric Co. v. Russell*, 79 Conn. 709, 66 Atl. 531; *Mohn*, 181 Iowa, 119, 164 N. W. 1070; *Bank of Montreal v. Bee*, 81, 157 N. W. 1070; *Bank v. Oaks*, 184 Mo. App. S. W. 679; *Milius v. Kauff*, 93 N. Y. App. D. 442, 93 N. Y. S. 749; *Holmes v. Webb*, 166 Wis. 280, *s. c. sub nom. Holmes v. Wisconsin Grain &c. Co.*, 164 N. W. 1007.

<sup>74</sup> See *supra*, § 135.

the claim in question has matured, it is often possible to find facts warranting an implication of a promise of extension or forbearance.<sup>75</sup>

Merely crediting a customer with the proceeds of a discounted note for his future drawing will not constitute a bank a holder for value.<sup>76</sup> This is inconsistent with the language of section 25, though undoubtedly in accord with principle apart from the statute. The bank by its discount and credit in effect has made a promise to pay the amount with which it credits the customer. This promise would be "sufficient to support a simple contract."<sup>77</sup> Where, however, the bank permits the customer to check out the proceeds of discounted paper, there is no doubt that it is a holder for value.<sup>78</sup> And so where an obligation is incurred by the bank in reliance on the proceeds of the discount.<sup>79</sup>

If the proceeds by agreement are used to pay a debt due from the customer to the bank, the latter has indisputably given value,<sup>80</sup> but if the application was not made by agreement but by the mere exercise of the banker's lien or right of set-off the contrary conclusion has been reached in New

<sup>75</sup> See *Many v. Krueger*, 153 Ill. App. 327; *Zimbelman v. Finnegan*, 141 Ia. 358, 118 N. W. 312.

<sup>76</sup> *Tatum v. Commercial Bank*, 185 Ala. 249, 254, 64 So. 561; *City Deposit Bank v. Green*, 130 Ia. 384, 106 N. W. 942; *McNight v. Parsons*, 136 Ia. 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Merchants Nat. Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068; *Miller v. Norton*, 114 Va. 609, 610, 77 S. E. 452. But see *contra*, *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715, 717, 718; *Capital & Counties Bank v. Gordon*, [1903] A. C. 240, 245. Cf. *Gaden v. Newfoundland Sav. Bank*, [1899] A. C. 281.

<sup>77</sup> See *Marling v. Fitzgerald*, 138 Wis. 93, 120 N. W. 388, 131 Am. St. Rep. 1003.

<sup>78</sup> *National Bank v. Silke*, [1891] 1

Q. B. 435, 439; *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82; *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 71 So. 630, L. R. A. 1916 F. 209; *Merchants Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82.

<sup>79</sup> *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509; *Montrose Savings Bank v. Claussen*, 137 Ia. 73, 114 N. W. 547; *National Bank of Commerce v. Armbruster*, 42 Okla. 65, 140 Pac. 1190. See also *Hermann's Ex. v. Gregory*, 131 Ky. 819, 115 S. W. 809.

<sup>80</sup> *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256, 55 Atl. 1080, 101 Am. St. Rep. 701; *Wallabout Bank v. Peyton*, 123 N. Y. App. D. 727, 108 N. Y. S. 42; *Ogle v. Armstrong (Okl.)*, 155 Pac. 1139.

York.<sup>81</sup> It is not requisite that value be adequate, 1 one who takes paper at a large discount,<sup>82</sup> or simply : for a short time to enforce a claim against a third : may be a holder in due course. But a large discount : evidence of bad faith when taken in connection with : circumstances.<sup>84</sup>

**Section 26.—[WHAT CONSTITUTES HOLDER VALUE.]** Where value has at any time been given instrument, the holder is deemed a holder for value in to all parties who became such prior to that time.

**Section 27.—[WHEN LIEN ON INSTRUMENT STITUTES HOLDER FOR VALUE.]** Where the holder has a lien on the instrument, arising either from contract or implication of law, he is deemed a holder for value to the extent of his lien.<sup>85</sup>

**Section 28.—[EFFECT OF WANT OF CONSIDERATION.]** Absence or failure of consideration is no defense as against any person not a holder in due course; and partial failure of consideration is a defence provided the failure is an ascertained and liquidated debt or otherwise.<sup>86</sup>

<sup>81</sup> *Consolidation Nat. Bank v. Kirkland*, 99 App. Div. 121, 91 N. Y. S. 353. But see Sec. 27. The words "by implication of law" in that section would seem to require an opposite decision.

<sup>82</sup> *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131; *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

<sup>83</sup> *Bank of Montreal v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

<sup>84</sup> *Harris v. Johnson*, 89 Conn. 128, 93 Atl. 126.

<sup>85</sup> See *Crowdson v. Shultz*, 165 C. C. A. 434, 254 Fed. 24; *Continental Credit Co. v. Ely*, 91 Conn. 553, 100 Atl. 434; *Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617, 163 S. W. 766; *Citizens Bank v. Limpricht*, 93 Wash. 361, 160 Pac. 1046. The transferee from such a lienholder may recover the full amount if he pays

value in good faith. *Burnes Mineral Fertilizer Co.*, 218 M. 105 N. E. 1074.

<sup>86</sup> It seems clear under this taken in connection with Sec. whatever may have been the result to the enactment of the statute *supra*, § 108), the burden, not introducing some evidence of consideration but of ultimately such lack, is thrown upon the defendant; but a number of decisions to notice the effect of the statute followed their previous rule that the ultimate burden is upon the defendant to establish sufficient consideration. The matter is discussed with reference to cases in *Shaffer v. Bond*, 1648, 99 Atl. 973, where the conclusion is reached. See also *Windsor Hotel Co. v. Beissbarth* (N.

### § 1147. Accommodation parties.

**Section 29.—[LIABILITY OF ACCOMMODATION PARTY.]** An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.<sup>87</sup>

This section does not affect the capacity, or lack of capacity to make an accommodation indorsement. By statute in some States, a married woman is incapable of contracting as surety for her husband.<sup>88</sup> Corporations cannot generally bind themselves in this way.<sup>89</sup> Nor has a partner authority to sign the partnership name for accommodation.<sup>90</sup> If a valid accommodation signature is made, knowledge by one who discounts the instrument that it was given for accommodation will not limit his rights. This was true before the enactment of the statute, and is expressly provided therein.<sup>91</sup>

Whether the authority to transfer accommodation paper is revoked on the maturity of the paper so that the accommodated party no longer can give a right even to a holder for value, is disputed. If an express agreement were made by which the accommodated party undertook to pay the obligation at maturity this agreement would, it seems, clearly

174 N. W. 217, and Brannan, Neg. Inst. Law (3d ed.) p. 95.

<sup>87</sup> In the Illinois Act the words "without receiving value therefor" are omitted and at the end of the section is added, "and in case a transfer after maturity was intended by the accommodating party, notwithstanding such holder acquired title after maturity."

<sup>88</sup> See *People's National Bank v. Schepflin*, 73 N. J. L. 29, 62 Atl. 333, and *supra*, § 269.

<sup>89</sup> See *Monument National Bank v. Globe Works*, 101 Mass. 57; *J. G. Brill Co. v. Norton & Taunton Street*

*Ry. Co.*, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210; *Cox & Sons Co. v. Northampton Brewing Co.*, 245 Pa. St. 418, 91 Atl. 859, Ann. Cas. 1916 A. 86.

<sup>90</sup> *Tanner v. Hall*, 1 Pa. St. 417.

<sup>91</sup> See *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544; *Packard v. Windholz*, 88 N. Y. App. Div. 365, 84 N. Y. S. 666; *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. Cf. *Lackawanna Trust Co. v. Carlucci* (Pa.), 107 Atl. 693.

## § 1148 BILLS OF EXCHANGE AND PROMISSORY NOTE

create an equity and one who took the note after would take subject to the equity. It seems a fair inference from the mere fact of accommodation that the accommodating party does make such agreement. For this reason the holder after maturity has generally been denied the right to recover.<sup>92</sup> Under the Negotiable Instruments Law, the Wisconsin court has held that transfer after maturity affords no defence to the accommodating party.<sup>93</sup>

## § 1148. How instruments are negotiated.

### ARTICLE III NEGOTIATION

**Section 30.—[WHAT CONSTITUTES NEGOTIATION.]**  
An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by delivery and the indorsement of the holder completed by delivery.

This section does not lay down an exclusive method of transferring the property in a negotiable instrument. It is true that though it had written upon it a special indorsement to a particular person may be sued on by another person to whom it had been assigned without indorsement.<sup>94</sup> The section does, however, prescribe an exclusive method of negotiating the instrument, that is, transferring a title free from encumbrances.

## § 1149. What amounts to an indorsement.

**Section 31.—[INDORSEMENT; HOW MADE.]** The indorsement of an instrument may be made in any of the following ways:

<sup>92</sup> See 26 Harv. L. Rev. 493, 495, 59 U. of Pa. L. Rev. 471, 486.

<sup>93</sup> *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. It will be observed that section 29 of the statute uses the phrase "holder for value" which is defined in section 26 of the Act. *Marling v. Jones* was decided largely on the strength of these words. See the criticism of

Professor Brannan, 26 Harv. L. Rev. 493, 497.

<sup>94</sup> An instrument may be "negotiated" within the meaning of this section by delivery to the payee *infra*, § 1157.

<sup>95</sup> *Carter v. Butler*, 264 Mo. 174 S. W. 399, Ann. Cas. 1917 See *infra*, Sec. 49, § 1155.

dorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.<sup>96</sup>

The indorsement may, like any other signature, be made in any form or any medium.<sup>97</sup>

This section does not completely define an indorsement, and some questions litigated before the passage of the statute are still open to argument. Thus the statute does not state whether an assignment or a guaranty operates as an indorsement. An indorsement normally involves both a transfer of the indorser's rights, and an obligation on his part. An assignment written on the note clearly indicates an intent to transfer the instrument.<sup>98</sup> But no clear intent is manifested to create an obligation on the part of the assignor. Nevertheless by the weight of authority, apart from statute, an assignment is in legal effect an indorsement,<sup>99</sup> and it is also so held under the Act.<sup>1</sup> A guaranty, however, written by the transferor of an instrument upon it, is not equivalent to an indorsement, but imposes only the obligations of a guarantor both at Common Law,<sup>2</sup> and under the Act.<sup>3</sup> The guaranty

<sup>96</sup> In the Illinois Act the following words are added "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

<sup>97</sup> *E. g.*, an indorsement by means of a rubber stamp made on behalf of a holder with his authority is sufficient. *American Union Trust Co. v. Never Break Range Co.*, 196 Mo. App. 206, 190 S. W. 1045; *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Flanders v. Snare*, 37 Pa. Sup. Ct. 28. So an indorsement if made as such by the legal holder need not be in the name by which the holder is designated as payee or indorsee on the instrument. *Ames Cas. B. & N.*, I. 346, 347, II, 564, 565. See further, *supra*, § 585.

<sup>98</sup> *Hall v. Toby*, 110 Pa. 318, 1 Atl. 369.

<sup>99</sup> *Sears v. Lantz*, 47 Ia. 658; *Farnsworth v. Burdick*, 94 Kans. 749, 147 Pac. 863; *Adams v. Blethen*, 66 Me. 19, 22 Am. Rep. 547; *Maine Trust and Banking Co. v. Butler*, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Copeland v. Burke*, (Okla. 1916), 158 Pac. 1162, L. R. A. 1917 A. 1165. A contrary decision is *Lyons v. Divelbis*, 22 Pa. 185.

<sup>1</sup> *Farnsworth v. Burdick*, 94 Kan. 749, 147 Pac. 863; *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. 1003. But see *Gale v. Mayhew*, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648.

<sup>2</sup> *Belcher v. Smith*, 7 Cush. 482; *Miller v. Gaston*, 2 Hill, 188; *Snevily v. Johnston*, 1 Watts & S. 307.

<sup>3</sup> *Ireland v. Floyd*, 42 Okla. 609, 142 Pac. 401, 1915 C. L. R. A. 661.

**§ 1150 BILLS OF EXCHANGE AND PROMISSORY NOTE**

is itself not negotiable, but merely assignable like a chose in action,<sup>4</sup> and one who purchases from a holder gets merely a guaranty on the back of the instrument of an indorsement, takes subject to equities.<sup>5</sup>

**§ 1150. Partial indorsements invalid.**

**Section 32.—[INDORSEMENT MUST BE OF INSTRUMENT.]** The indorsement must be an indorsement of the entire instrument. An indorsement purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as an indorsement of the instrument. But where the instrument is paid in part, it may be indorsed as to the residue.<sup>6</sup>

**§ 1151. Various kinds of indorsement.**

**Section 33.—[KINDS OF INDORSEMENT.]** An indorsement may be either special or in blank; and it may be either restrictive or qualified, or conditional.

**Section 34.—[SPECIAL INDORSEMENT; INSTRUMENT IN BLANK.]** A special indorsement specifies a person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsement is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

**Section 35.—[BLANK INDORSEMENT CHANGED TO SPECIAL INDORSEMENT.]** The indorsement may convert a blank indorsement into a special indorsement.

See also *Stephens v. Bowles* (Mo. App.), 206 S. W. 589, where the signature was "as surety."

<sup>4</sup> *Edgerly v. Lawson*, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432.

<sup>5</sup> *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. Ed. 876; *Ireland v. Floyd*, 42 Okl. 609, 142 Pac. 401, 1915 C. L. R. A. 661. But in *Partridge v. Davis*, 20 Vt. 499, the

court held such a guaranty and purposes an indorsement. See *First Nat. Bank v. Baldwin*, 25, 158 N. W. 371.

<sup>6</sup> See *Offenstein v. W. Kan.* 739, 132 Pac. 991; *Muller*, 164 N. Y. App. L. N. Y. S. 620; *Smith*, 182 Pa. 24, 37 Atl. 844, 823.

by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.<sup>7</sup>

§ 1152. Restrictive and qualified indorsements.

Section 36.—[WHEN INDORSEMENT RESTRICTIVE.]  
An indorsement is restrictive, which either,—

(1) Prohibits the further negotiation of the instrument;  
or

(2) Constitutes the indorsee the agent of the indorser; or

(3) Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

An indorsement for collection is restrictive and makes the indorsee merely a trustee to collect for the beneficial owner.<sup>8</sup> It is common to speak of an indorsee for collection as an agent rather than as a trustee, but as such an indorsee can maintain an action in its own name on the instrument, and could do so prior to the Statute, it seems clear that he is properly a trustee rather than an agent.<sup>9</sup> Whether an indorsement “to any bank or banker” though not in terms an indorsement for collection is by virtue of banking custom to be so interpreted is not clear.<sup>10</sup>

<sup>7</sup> It seems improbable that any contract is consistent with a blank indorsement except one which merely affects the question of the person to whom the obligation of the indorsement shall run. There is no implied authority to write a guaranty over such an indorsement, *Belden v. Hann*, 61 Ia. 42, 15 N. W. 591, and its effect cannot be varied by parol evidence. *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145.

<sup>8</sup> *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363, 13 Sup. Ct. 533; *Lippitt v. Thames L. & T. Co.*, 88 Conn. 185, 90 Atl. 369; *Armstrong v. National Bank*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553;

*Freeman's Bank v. Tube Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857; *Murchison Nat. Bank v. Dunn Oil Mills*, 150 N. C. 718, 64 S. E. 885. See also *Werner Piano Co. v. Henderson*, 121 Ark. 165, 180 S. W. 495.

<sup>9</sup> *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176; *Ward v. Tyler*, 52 Pa. 393; *Metsger v. Sigall*, 83 Wash. 80, 145 Pac. 72.

<sup>10</sup> See *First Nat. Bank v. Weitzel*, 239 Fed. 497, 152 C. C. A. 375; *Citizens' Trust Co. v. Ward*, 195 Mo. App. 223, 190 S. W. 364; *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917 E. 374.

**Section 37.—[EFFECT OF RESTRICTING INSTRUMENT; RIGHTS OF INDORSEE.]** A restrictive instrument confers upon the indorsee the right,—

- (1) To receive payment of the instrument;
- (2) To bring any action thereon that the indors bring;
- (3) To transfer his rights as such indorsee, with the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the rights of the first indorsee under the restrictive indorsement.<sup>11</sup>

**Section 38.—[QUALIFIED INDORSEMENT.]** A qualified indorsement constitutes the indorser a mere assignor of title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or words of similar import. Such an indorsement does not impair the negotiable character of the instrument.<sup>12</sup>

**Section 39.—[CONDITIONAL INDORSEMENT.]**

<sup>11</sup> In the Illinois Act the following words are added to subsection 2: "or except in the case of a restrictive indorsement specified in section 36—subsection 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring." Subsection 3 reads as follows: "(3) To transfer the instrument, where the form of the indorsement authorizes him to do so" and at the end of the section is added: "specified in section 36—subsection 1—and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively." See *National Bank v. Bossemeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917 E. 374; *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497, 114 Am. St. 858; *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72; *American Sav. & C. Bank v. Dennis*, 90 Wash. 547, 156 Pac. 559.

<sup>12</sup> See cases cited under Sec. 31, *supra*, § 1149. Though the statute speaks of "adding" the words "without

recourse," it may be shown where the statute has been passed that the words "without recourse" below one indorsement and another were written by the indorser. *Leahmer v. McCull*, Kan. 451, 162 Pac. 297; *C. Wallace*, 154 Ky. 596, 157 S. W. 49 L. R. A. (N. S.), 789. Prior to the enactment of the statute such evidence was admissible, *C. Fetzer*, 47 Neb. 269, 66 N. W. 134 Am. St. Rep. 989; *Pag*, 65 Or. 450, 131 Pac. 1013, 41 L. R. A. (N. S.) 247, Ann. Cas. 1914 E. 191; *Elgin City Banking Co. v. Tenn.*, 548, 108 S. W. 1068; *Thurston*, 38 Utah, 351, 111 L. R. A. 69 W. Va. 109, 70 S. E. 1089; *A. (N. S.)* 587.

an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

**§ 1153. Other kinds of indorsement.**

**Section 40.—[INDORSEMENT OF INSTRUMENT PAYABLE TO BEARER.]** Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.<sup>13</sup>

**Section 41.—[INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.]** Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

This section follows the previously existing rule.<sup>14</sup> It would seem, however, that either payee or indorsee could discharge the instrument, though unable to negotiate it.<sup>15</sup> The section does not cover the case of an instrument payable to "A or B," but only the case of joint payees.<sup>16</sup>

**Section 42.—[EFFECT OF INSTRUMENT DRAWN OR INDORSED TO A PERSON AS CASHIER.]** Where an in-

<sup>13</sup> In the Illinois Act instead of the words "payable to bearer," are the words "originally payable to or indorsed specially to bearer." See the criticism of the section in 26 Harv. L. Rev. 493, 500. It is probably applicable only to instruments which on their face are expressed to be payable to bearer, though section 9 (5) classifies instruments indorsed in blank as also payable to bearer. See Crawford, N. I. L. (4th ed.) 83.

<sup>14</sup> *Foster v. Hill*, 36 N. H. 526. See *Allen v. Corn Exchange Bank*, 87 N. Y. App. Div. 335, 84 N. Y. S. 1001. Under the statute see *First Nat. Bank v. Gridley*, 112 N. Y. App. D. 398, 98 N. Y. S. 445; *Martz v. State Nat. Bank*, 147 N. Y. App. Div. 250, 131 N. Y. S. 1045.

<sup>15</sup> See *supra*, § 343.

<sup>16</sup> *Union Bank v. Spies*, 151 Iowa, 178, 130 N. W. 928. See Sec. 8 (5) of the Act, *supra*, § 1139, also § 325.

maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.<sup>22</sup>

**Section 46.—[PLACE OF INDORSEMENT; PRESUMPTION.]** Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Though a note is presumed to have been made where it is dated, evidence of a different actual place of making is admissible,<sup>23</sup> unless this would invalidate the instrument; in which case the signer is estopped to deny the truth of the representation contained in the instrument.<sup>24</sup>

**Section 47.—[CONTINUATION OF NEGOTIABLE CHARACTER.]** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Under this section a bill or note is negotiable after maturity,<sup>25</sup> but the right of one who then purchases will be limited by the fact that he is not a holder in due course. He will succeed to the legal title of his transferor, but will be subject to all defences which were good against the latter.<sup>26</sup>

**Section 48.—[STRIKING OUT INDORSEMENT.]** The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.<sup>27</sup>

<sup>22</sup> See *German-American Bank v. Cunningham*, 97 N. Y. App. D. 244, 89 N. Y. S. 836; *Cedar Rapids Nat. Bank v. Bashara*, 39 Okla. 482, 135 Pac. 1051.

<sup>23</sup> *Finch v. Calkins*, 183 Mich. 298, 149 N. W. 1037.

<sup>24</sup> *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. 717.

<sup>25</sup> *Barnes v. Carr*, 65 Fla. 87, 61 So.

184; *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 69 Atl. 681.

<sup>26</sup> *Ohio Valley &c. Co. v. Great Southern F. Ins. Co.*, (Ky. 1917), 197 S. W. 399.

<sup>27</sup> See *New Haven Mfg. Co. v. New Haven Pulp Co.*, 76 Conn. 126, 55 Atl. 604; *Jerman v. Edwards*, 29 Dist. Col. App. 535; *Howell v. Commercial Nat. Bank*, 40 App. D. C. 370; *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82;

**§ 1155. Transfer of negotiable instrument distinguish negotiation.**

**Section 49.—[TRANSFER WITHOUT INDORSE EFFECT OF.]** Where the holder of an instrument to his order transfers it for value without indorsing transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. For the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect at the time when the indorsement is actually made.<sup>28</sup>

The effect of this section is to give the transferee the same position as an assignee of a tangible non-negotiable chose in possession, who has power to sue in his own name.<sup>29</sup> But he is not a holder in due course.<sup>30</sup>

**§ 1156. Reissue.**

**Section 50.—[WHEN PRIOR PARTY MAY NEGOTIATE INSTRUMENT.]** Where an instrument is negotiated to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But

*Mackintosh v. Gibbs*, 79 N. J. L. 40, 74 Atl. 708.

<sup>28</sup> In the Illinois and Missouri Acts, after the word "right," the first sentence continues as follows: "to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose," etc. In the Colorado Act, at the end of the first sentence, there is added, "if omitted by mistake, accident or fraud." In the Wisconsin Act, at the end of the section, there is added: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of the transfer."

<sup>29</sup> *Smith v. Nelson Land & C* 212 Fed. 56, 128 C. C. A. 51; *Field Bank v. McKinley*, 53 125 Pac. 493; *Goodsell v. Bros. Co.*, 86 Conn. 402, 85 *Foster's Admr. v. Metcalfe*, 385, 138 S. W. 314; *Kiefer v. 128 Minn. 519*, 151 N. W. 52; *v. Butler*, 264 Mo. 306, 174 S. *Martz v. State Nat. Bank*, 1 App. Div. 250, 131 N. Y. S. 10; see *Myers v. Petty*, 153 N. C. S. E. 417; *Elgin City Bank v. McEachern*, 163 N. C. 333, 680.

<sup>30</sup> *Foster's Adm. v. Metcalfe*, Ky. 385, 138 S. W. 314; *Manufacturers' &c. Co. v. Blitz*, 131 N. D. 17, 115 N. Y. S. 402; *White*, 127 Tenn. 504, 151 1031.

not entitled to enforce payment thereof against any intervening party to whom he was personally liable.<sup>31</sup>

§ 1157. Who is a holder in due course.

## ARTICLE IV

### RIGHTS OF THE HOLDER

**Section 51.—[RIGHT OF HOLDER TO SUE; PAYMENT.]** The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument.<sup>32</sup>

**Section 52.—[WHAT CONSTITUTES A HOLDER IN DUE COURSE.]** A holder in due course is a holder who has taken the instrument under the following conditions:—

- (1) That it is complete and regular upon its face; <sup>33</sup>
- (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; <sup>34</sup>
- (3) That he took it in good faith and for value;
- (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.<sup>35</sup>

<sup>31</sup> See *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671. The words "subject to the provisions of this Act" probably refer to Section 121. That section relates exclusively to payment at or after maturity. Though by the terms of the last sentence there can be no recovery against a party whose obligation intervenes between the two acquisitions of the instrument of the prior party, it may happen by negotiation of the instrument to a subsequent holder in due course that the intervening party may become liable.

<sup>32</sup> "Holder" includes one who holds as security, and such a holder may enforce the instrument, *Melton v. Pensacola Bank*, 190 Fed. 126, 111 C. C. A. 166, as may a holder for

collection with no personal interest. *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393; *Harrison v. Percy*, 174 Ky. 485, 192 S. W. 513. But see *Third Nat. Bank v. Exum*, 163 N. C. 199, 79 S. E. 498.

<sup>33</sup> As to incomplete instruments, see *supra*, §§ 1140, 1141.

<sup>34</sup> The last clause of this subsection refers to two cases: first, that of demand paper which has previously been presented and dishonored, though the purchaser had no reason to suppose so; and, second, to a time bill of exchange which has previously been presented for acceptance and acceptance refused. As to when an instrument is overdue, see *infra*, §§ 1170–1176.

<sup>35</sup> In the Wisconsin Act there is the

Prior to the enactment of the Statute there was that a payee who took in good faith for value was against personal defences as fully as a subsequent holder. There is no reason to suppose that there was any to change this rule, nor is there any necessity for the section in a way to change it. Such is the authority.<sup>37</sup> But because in subsection 4, reference to the time the instrument was "negotiated" to the courts of Iowa and Missouri, by what seems necessarily technical construction, have held the payee to be a holder in due course.<sup>38</sup>

**Section 53.—[WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE.]** Where an instrument payable to order or to bearer is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

**Section 54.—[NOTICE BEFORE FULL AMOUNT PAID.]** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.<sup>40</sup>

further subsection: (5) "That he took it in the usual course of business."

<sup>36</sup> *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646; 97 Am. St. Rep. 426, and cases cited, *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957, L. R. A. 1918 E. 1042, and cases cited.

<sup>37</sup> *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, 843, L. R. A. 1915 F. 1157; *Boston S. & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915 B. 144; *National Investment Co. v. Corey*, 222 Mass. 453, 111 N. E. 357; *Brown v. Brown*, 91 N. Y. Misc. 220, 154 N. Y. S. 1098; *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957, 105 Atl. 705, L. R. A. 1918 E. 1042. See also *Wilbour v. Hawkins* (R. I.), 94 Atl. 856.

<sup>38</sup> *Vander Ploeg v. Van Iowa*, 350, 112 N. W. 807, (N. S.) 490, 124 Am. St. Rep. 490; *Long v. Shafer*, 185 Mo. App. 171 S. W. 690; *St. Charles Bank v. Edwards*, 243 Mo. App. S. W. 978. See also *Wheeler*, [1902] 1 K. B. 361, however, *cf. Lloyds Bank v. Manhattan Co.*, 97 N. Y. S. 629, aff'd 180 N. Y. S. 629, 162 N. Y. S. 629, aff'd 180 N. Y. S. 629, 166 N. Y. S. 1093.

<sup>39</sup> See *infra*, §§ 1171 et seq.  
<sup>40</sup> See *Simmons v. Hodgson*, 424, 162 C. C. A. 494; *Central Bank v. Stotter* (Mich.), 142; *Rosenbaum v. Roth*, App. D. 617, 150 N. Y. S. 853; *v. Buckley*, 167 N. Y. App. N. Y. S. 853.

**Section 55.—[WHEN TITLE DEFECTIVE.]** The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.<sup>41</sup>

**Section 56.—[WHAT CONSTITUTES NOTICE OF DEFECT.]** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

This section states the rule supported by the great weight of authority prior to the passage of the statute.<sup>42</sup> To one who is disposed to put no narrower restriction on the law governing actionable negligence than is involved in the definition, "the careless doing of an act likely to cause damage and which does cause damage to another," there may seem an inconsistency in permitting recovery by one whose carelessness in purchasing the instrument has deprived the obligor of a defence which he would have had against the previous holder. Unquestionably negligence, especially if gross, when taken in

<sup>41</sup> In the Wisconsin Act there is added at the end of the section: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care." See chapters dealing with fraud, duress, mistake, illegality &c. As to the case where the signature of one of several joint makers is obtained by unlawful means, see *Schmidt v. Bank of Commerce*, 234 U. S. 64, 34 S. Ct. 730, 58 L. Ed. 1214.

<sup>42</sup> Daniel, *Neg. Inst.*, § 775. See for decisions under the Statute, *Elmore*

*County Bank v. Avant*, 189 Ala. 418, 66 So. 509; *Arnd v. Aylesworth*, 145 Ia. 185, 123 N. W. 1000, 29 L. R. A. (N. S.), 638; *Ford v. Ott* (Ia.), 173 N. W. 121; *Farmers' Bank v. First Nat. Bank*, 164 Ky. 548, 175 S. W. 1019; *Citizens' State Bank v. Johnson County* (Ky.), 207 S. W. 8; *Van Slyke v. Rooks*, 181 Mich. 88, 147 N. W. 579; *Davis v. Clark*, 85 N. J. L. 696, 90 Atl. 303; *Interboro Brewing Co. v. Doyle*, 165 N. Y. App. D. 646, 151 N. Y. S. 325; *Everding v. Toft*, 82 Oreg. 1, 160 Pac. 1160; *Ochsenreiter v. Block* (S. Dak.), 173 N. W. 734; *Scandinavian Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

connection with other matters, may be evidence of actual bad faith;<sup>43</sup> and only the desirability of imposing as little restriction as possible on the free transfer of negotiable instruments can justify the rule codified by the statute of allowing a holder to recover if his failure to learn of the rights or defences of others has been due to his own negligence.

It is not necessary, however, in order to subject a holder to a defence that he should have known the particular nature of the defence; it is enough that he had notice that there was something wrong.<sup>44</sup> But one who has notice that the consideration for a negotiable instrument was an executory promise is not thereby deprived of the status of a holder in due course unless he also has notice that the promise has been broken.<sup>44a</sup>

Since under section 52 (1), the instrument must have been "regular on its face" in order to constitute a purchaser a holder in due course, statements on the instrument itself showing that a negotiation is necessarily improper charge a holder with notice without reference to whether he did or did not draw correct inferences from the statements, as, for example, where an instrument is payable to trustees,<sup>45</sup> or an instrument made or indorsed by a trustee, executor, member of a firm, officer of a corporation or other fiduciary as

<sup>43</sup> *McNight v. Parsons*, 136 Ia. 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Link v. Jackson*, 158 Mo. App. 63, 139 S. W. 588; *Kipp v. Smith*, 137 Wis. 234, 238, 118 N. W. 848.

<sup>44</sup> *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830; *Ozark Motor Co. v. Horton* (Mo. App.), 196 S. W. 395.

<sup>44a</sup> *Piedmont Carolina Ry. Co. v. Shaw*, 223 Fed. 973, 138 C. C. A. 227; *Phoenix Safety Inv. Co. v. Michaels* (Ariz.), 176 Pac. 587; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Marx v. Frey*, 137 La. 948, 69 So. 757; *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88; *Hakes v. Thayer*, 165 Mich. 478, 131 N. W. 474; *Security Trust &c. Co. v.*

*Gleichman* (Okl.), 150 Pac. 908; *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769. But see *contra*, *Heard v. Shedden*, 113 Ga. 162, 38 S. E. 387; *Sumter County State Bank v. Hays*, 68 Fla. 473, 67 So. 109. The question is identical in substance with that involved in the discussion whether a note which recites an executory promise as consideration is negotiable (see *supra*, § 1137, n. 14), namely: Does a recital or knowledge of such consideration compel inquiry whether the promise has been broken?

<sup>45</sup> *Ford v. Brown*, 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188; *Dollar Savings &c. Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587.

such is taken in payment of an individual debt of the signer.<sup>46</sup>

### § 1158. Absolute and personal defences.

The statute does not mark out, as clearly as it might, the sharp distinction between absolute and personal defences; though unquestionably, under the statute as before its enactment, the law distinguishes between a situation where there is only apparently but not really a negotiable obligation, and a case where there is an actual negotiable obligation but for some equitable or personal reason it should not be enforced.

<sup>46</sup> *National Bank v. Law*, 127 Mass. 72; *J. G. Brill Co. v. Norton, etc.*, St. Ry. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; *Newburyport v. Fidelity Ins. Co.*, 197 Mass. 596, 84 N. E. 111; *Newburyport v. Spear*, 204 Mass. 146, 90 N. E. 522; *Johnson-Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. 1035; *Coleman v. Stocke*, 159 Mo. App. 43, 139 N. W. 216; *Reynolds v. Title Guaranty Trust Co.*, 196 Mo. App. 21, 189 S. W. 33; *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 150, 24 N. E. 384, 17 Am. St. Rep. 625; *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; *Lanning v. Trust Co. of America*, 137 N. Y. App. D. 722, 122 N. Y. S. 485; *Empire State Surety Co. v. Nelson*, 141 N. Y. App. D. 850, 126 N. Y. S. 453; *Newman v. Newman*, 160 N. Y. App. D. 331, 145 N. Y. S. 325; *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 484; *Brovan v. Kyle*, 166 Wis. 347, 165 N. W. 383. See also *Taylor v. Harris's Adm.*, 164 Ky. 654, 176 S. W. 168; *Franklin Sav. Bank v. International Trust Co.*, 215 Mass. 231, 102 N. E. 363; *Quincy Mutual Fire Ins. Co. v. International Trust Co.*, 217 Mass. 370, 104 N. E. 845, L. R. A. 1915 B. 725; *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; *Niagara Woolen Co. v. Pacific Bank*, 141 N. Y. App. D.

265, 126 N. Y. S. 890; *United States Fidelity, etc., Co. v. United States Nat. Bank*, 80 Oreg. 361, 157 Pac. 155, L. R. A. 1916 E. 610; *Sheer v. Hall & Lyon Co.*, 36 R. I. 47, 88 Atl. 801; *Pelton v. Spider Lake Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963. Cf. *In re Troy & Cohoes Shirt Co.*, 136 Fed. 420; *Havana Central R. Co. v. Central Trust Co.*, 204 Fed. 546, 123 C. C. A. 72, L. R. A. 1915 B. 715; *Miami County Bank v. State*, 61 Ind. App. 360, 112 N. E. 40; *Batchelder v. Central Nat. Bank*, 188 Mass. 25, 73 N. E. 1024; *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916, L. R. A. 1915, C. 518; *Allen v. Fourth Nat. Bank*, 224 Mass. 239, 112 N. E. 650; *Kindall v. Fidelity Trust Co.*, 230 Mass. 238, 119 N. E. 861; *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625; *Orr v. South Amboy Terra Cotta Co.*, 113 N. Y. App. D. 103, 98 N. Y. S. 1026; *Havana Central R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12, L. R. A. 1915 B. 720; *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916 F. 1059; *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933; *United States Fidelity &c. Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109; *Mitchell Street State Bank v. Froedtert (Wis.)*, 170 N. W. 822.

If the signature of a maker to a negotiable instrument is forged, though he has apparently entered into a obligation, in fact he has not. If, however, he has been induced by fraudulent misstatements to sign such an instrument, he has actually entered into a negotiable obligation, and it is unjust to enforce it in favor of the fraudulent party. On the forged note nobody can recover against the maker. On the fraudulent note the payee, if a party to the fraud, could not recover, but a holder in due course can. It may then be said that forgery is an absolute or real defence, while such fraud as that given in the illustration is an equitable defence, or, briefly, an equity. No defence is available against a holder in due course on the distinction between absolute or real defences on the one hand and personal defences or equities on the other hand, is fundamental in the law of negotiable instruments. All the defences in question, whether absolute or personal, would be available in case of non-negotiable contracts, and, therefore, in distinguishing between such contracts, there is not the same importance in distinguishing the two classes of defences. Though most defences are dealt with in other parts of this book with reference to their application to contracts generally, yet they may conveniently be summarized here. Prior to the enactment of the Negotiable Instruments Law, the following defences to an obligation were absolute or real, and still remain so unless section 57 of the Act requires a different result:

First—The lack of genuineness of the signature. It may be due to forgery or it may be due to lack of authority on the part of an agent who made the signature on behalf of the maker.

Second—Fraud or duress of some kinds;

Third—Lack of title, as where a holder claims title by a forged indorsement;

Fourth—Bankruptcy of the holder;

Fifth—Legal incapacity as of a minor, an insane person, and in some jurisdictions as to some matters—a married woman;

Sixth—Illegality of certain kinds;

Seventh—The legal discharge of the instrument or the obligation in question.

The following are personal defences, or equities only, and are not available against a holder in due course:

First—Illegality of certain kinds;

Second—Fraud or duress generally;

Third—Lack of delivery of the instrument;

Fourth—Lack of consideration;

Fifth—Failure of consideration;

Sixth—Alteration;

Seventh—Discharge of the instrument before maturity;

Eighth—A surety is discharged by certain dealings with his principal which are prejudicial to him;

Ninth—Set-off.

There may be a defence to one obligation on a negotiable instrument and no defence to another on the same instrument. Sometimes all the obligations on an instrument are subject to the same defence, as where the instrument is materially altered after all the signatures have been put upon it. Sometimes there may be a defence of one kind to one obligation on the instrument, and a defence of another kind to another obligation. The obligation of each person whose name appears on the instrument frequently must be considered separately.

§ 1159. To what defences a holder in due course is subject.

Section 57.—[RIGHTS OF HOLDER IN DUE COURSE.] A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.<sup>47</sup>

The words "Defect of title" in this section even when aided by section 55 and by the definition of holder do not indicate with perfect clearness that it is only personal or equitable defences from which the holder is freed, but there was probably no intention to change the law in regard to the matter, and there is no reason to suppose that a change has

<sup>47</sup> In the Illinois Act defences of fraud, circumvention and gaming within the meaning of certain local statutes are excepted and remain as

before the passage of the Act, absolute defences. In the Wisconsin statute also some exceptions are made to the enactment of freedom from defences.

been effected. Therefore, though in some cases a purchaser of an instrument payable to bearer can enforce it even though by common law or statute the instrument was originally void,<sup>48</sup> yet where the instrument was originally void, and there are either no circumstances justifying an estoppel, or, though there are, the policy of the law forbids enforcement of the instrument even by a holder in due course,<sup>49</sup> such a holder, according to the better view, cannot recover under the statute any more than under the previously prevailing law.<sup>50</sup> There are, however, decisions which lay stress on the words of the statute as showing that such illegality as formerly subjected a note to an absolute defence now affords merely a personal one.<sup>51</sup>

Section 57 changes the law of some States by allowing (as it properly should) a holder in due course to recover the full amount of a note subject to an equitable defence, though the holder bought it at a discount.<sup>52</sup>

<sup>48</sup> *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Schaeffer v. Marsh*, 90 N. Y. Misc. 307, 153 N. Y. S. 96; *Jefferson Bank v. Chapman*, 122 Tenn. 415, 123 S. W. 641. The possibility of such cases is clearly recognized in the statute, which seems to allow the enforcement of, *e. g.*, an undelivered note stolen (see section 16); a forged instrument where the apparent maker has precluded himself from setting up the forgery against a holder in due course (section 23).

<sup>49</sup> See *infra*, § 1676.

<sup>50</sup> *Perry Savings Bank v. Fitzgerald*, 167 Ia. 446, 149 N. W. 497 (usurious note); *National Bank of Shenandoah v. Hall*, 169 Ia. 218, 151 N. W. 120 (such fraud as rendered note void); *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Lawson v. Fulton First Nat. Bank*, 31 Ky. L. Rep. 318, 102 S. W. 324 ("peddler's note"); *Bothell v. Miller*, 87 Neb. 835, 128 N. W. 628 (such fraud as rendered note void); *Sabine v. Paine*, 166 N. Y. App. D. 9, 151 N. Y. S. 735, 223 N. Y. 401, 119 N. E. 849 (usurious note); *Twentieth*

*Street Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917 D. 695 (note for gaming); *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212 (note of drunken man). See also *Lewis v. Clay*, 14 T. L. R. 149 (such fraud as rendered instrument void).

<sup>51</sup> *Wirt v. Stubblefield*, 17 Dist. Col. App. 283; *Farmers' Savings Bank v. Reed*, 192 Mo. App. 344, 180 S. W. 1002 (note for illegal assignment of liquor license); *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, 12 Am. Cas. 1138 (usurious note); *Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591 (usurious note, but see later New York decision in previous note); *National Bank of Commerce v. Pick*, 13 N. Dak. 74, 99 N. W. 63 (note of foreign corporation illegally doing business); *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842 (note for lightning rods not stating consideration); *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629 (note for stallion not stating consideration).

<sup>52</sup> *Lassas v. McCarty*, 47 Oreg. 474,

**Section 58.—[WHEN SUBJECT TO ORIGINAL DEFENSES.]** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.<sup>53</sup>

**Section 59.—[WHO DEEMED HOLDER IN DUE COURSE.]** Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

§ 1160. Liability of maker, drawer or acceptor.

## ARTICLE V

### LIABILITIES OF PARTIES

**Section 60.—[LIABILITY OF MAKER.]** The maker of a negotiable instrument by making it engages that he will

84 Pac. 76; *Jefferson Bank v. Chapman White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641.

<sup>53</sup> A purchaser from a holder in due course may recover though he took with notice of a personal defence. *McMurray v. McMurray*, 258 Mo. 405, 167 S. W. 513; *Ratliffe v. Costello*, 117 Va. 563, 85 S. E. 469. As to the second sentence of the section see *First Nat. Bank v. Stroup* (Kan.), 177 Pac. 836. This sentence does not seem to cover fully a case where a holder takes an instrument, not previously negotiated to a holder in due course, with notice of fraud or illegality, and after disposing of it to a holder in

due course again becomes the holder. Such a person is not "a party to any fraud" in a strict sense, and it was therefore said in *Horan v. Mason*, 141 N. Y. App. Div. 89, 125 N. Y. S. 668, that only the payee of an instrument subject to the defence of fraud or illegality is debarred from improving his title by a subsequent acquisition of the instrument from a holder in due course. See a criticism of the section for this reason in 26 Harv. L. Rev. 493, 502. It seems, however, by liberal construction of the section a court need not reach the conclusion of the New York court. See *Berenson v. Conant*, 214 Mass. 127, 101 N. E. 60.

pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse.<sup>54</sup>

**Section 61.—[LIABILITY OF DRAWER.]** The drawer by drawing the instrument admits the existence of the payee and his then capacity to endorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

**Section 62.—[LIABILITY OF ACCEPTOR.]** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; <sup>54a</sup> and admits,—

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

(2) The existence of the payee and his then capacity to endorse.

It has been settled since the time of Lord Mansfield <sup>55</sup> that a drawee who pays (or accepts) a bill on which the signature of the drawer is forged does so at his peril, and cannot recover the payment or rescind the acceptance as against an innocent holder.<sup>56</sup>

<sup>54</sup> This section is applicable though the maker signed for accommodation. *First State Bank v. Williams*, 164 Ky. 143, 175 S. W. 10; *Vanderford v. Farmers' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Richards v. Market Exch. Bank*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99.

<sup>54a</sup> *Smith v. W. M. Hurlbut Co.* (Conn.), 106 Atl. 319.

<sup>55</sup> By the case of *Price v. Neal*, 3 Burr. 1354, s. c. 1 Wm. Black. 390, and cases in the following note.

<sup>56</sup> *Smith v. Mercer*, 6 Taunt. 76; *Hoffman v. Milwaukee Bank*, 12 Wall.

181, 20 L. Ed. 366; *United States v. New York Bank*, 219 Fed. 648, 134 C. C. A. 579, L. R. A. 1915 D. 797; *United States v. Chase Nat. Bank*, 241 Fed. 535, 250 Fed. 105, 162 C. C. A. 277; *Young v. Lehman*, 63 Ala. 519; *First Bank v. Ricker*, 71 Ill. 439, 441, 22 Am. Rep. 104; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; *Manufacturers' Bank v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280, 282, 24 N. E.

This has been generally rested on an obligation on the part of the drawee to know the signature of the drawer; and probably no other good reason can be found. It is clear that the holder does not warrant the genuineness of the instrument. One who presents a bill to a drawee for acceptance or payment makes no representation of the validity of the document. It is not a sale of the bill, but a presentation of what purports to be an order on the drawee calling upon him to act. The holder presents this and asks what action the drawee proposes to take. But both parties doubtless assume that the instrument is genuine. And the holder who receives the payment had no genuine claim against the person purporting to be the drawer.<sup>57</sup> Therefore, except for a duty cast upon the drawee to determine the truth, it is hard to see why rescission for mutual mistake is not appropriate.<sup>57a</sup> The statute adopts the rule of the common law.<sup>58</sup>

44, 21 Am. St. Rep. 450; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 288; Germania Bank v. Boutell, 60 Minn. 189, 195, 62 N. W. 327, 51 Am. St. Rep. 519; State Bank v. First Nat. Bank, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100; State Nat. Bank v. Bank of Magdalena, 21 N. Mex. 653, 157 Pac. 498, Ann. Cas. 1916 E. 1296; Havana Central R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12, 1915 B. L. R. A. 720; Bergstrom v. Ritz-Carlton Co., 171 N. Y. App. D. 776, 157 N. Y. S. 959; State Bank v. Cumberland Sav. Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D. 1138; First Nat. Bank of Belmont v. First Nat. Bank of Barnesville, 58 Oh. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342, 125 Pac. 464; First Nat. Bank v. Bank of Cottage Grove, 59 Oreg. 388, 117 Pac. 293; People's Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St.

Rep. 817; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117. But see First Nat. Bank of Wyndmere, 15 N. Dak. 299, 108 N. W. 540, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588; Union Nat. Bank v. Franklin Nat. Bank, 249 Pa. 375, 94 Atl. 1085; Colonial Trust Co. v. National Bank, 50 Pa. Super. 510; First Nat. Bank v. Brule, 38 S. Dak. 396, 161 N. W. 616.

<sup>57</sup> See *infra*, § 1574.

<sup>57a</sup> See a discussion of the principle by Ames in 4 Harv. L. Rev. 297; Keener, Quasi Contracts, 154; Wigmore, 25 Am. L. Rev. 695, 706; Woodward, Quasi Contracts, § 80. Even if such a duty is admitted, the existing law is somewhat hard to explain, since the negligence of the plaintiff does not ordinarily preclude recovery of money paid under a mistake. See *infra*, § 1596.

<sup>58</sup> Farmers' Nat. Bank v. Farmers', etc., Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915 A. 77; National Bank of Commerce v. Mechanics' Nat. Bank, 148 Mo. App. 1, 127 S. W. 429; Title Guarantee, etc., Co. v. Haven, 196 N. Y. 487, 492, 89 N. E. 1082,

Presumably the qualification usually made to the rule prior to the enactment of the Negotiable Instruments Law—namely that if the holder was guilty of no recovery is allowed the drawee,—<sup>59</sup> is not abolished by the statute.<sup>60</sup>

Apparently also by the first paragraph of section 63 who accepts a raised bill or check is bound to pay an holder the raised amount. This result is contrary to the previously existing law,<sup>61</sup> but in accordance with the law of the continent of Europe;<sup>62</sup> and if a change in the Common Law has been made by the Statute, it seems a desirable one.

### § 1161. Irregular indorsers.

**Section 63.—[WHEN PERSON DEEMED INDORSER.]**  
A person placing his signature upon an instrument in a way other than as maker, drawer or acceptor, is deemed an indorser, unless he clearly indicates by appropriate language his intention to be bound in some other capacity.<sup>64</sup>

1085, 25 L. R. A. (N. S.) 1308; *State Bank v. Cumberland, etc., Trust Co.*, 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D. 1138; *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464; *First Nat. Bank v. Bank of Cottage Grove*, 59 Or. 388, 117 Pac. 293. A statutory rule to the contrary in Pennsylvania has not been changed by the passage of the Negotiable Instruments Law. *Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. 375, 94 Atl. 1085.

<sup>59</sup> See *infra*, § 1572.

<sup>60</sup> *Farmers' Nat. Bank v. Farmers' & Traders' Bank*, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915 A. 77; *Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. 513; *State Nat. Bank v. Bank of Magdalena*, 21 N. Mex. 653, 157 Pac. 498, L. R. A. 1916 E. 1296; *Williamsburgh Trust Co. v. Tumb Suden*, 120 N. Y. App. D. 518, 105 N. Y. S. 335; *First Nat. Bank v. Bank of Cottage Grove*, 59 Oreg. 388, 117 Pac. 293; *Canadian Bank v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A.

955. But see *National Bank of Commerce v. Mechanics' &c. Co.*, 1 Mo. App. 1, 127 S. W. 429; *First Nat. Bank v. Cumberland Sav. &c. Co.*, 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D. 1138. As to the effect of the negligence of a depositor of a bank in failing to cover forgeries, see *supra*, § 1159, and 32 Harv. L. Rev. 28.

<sup>61</sup> A drawee who has paid an altered bill has been allowed the payment back in: *Imperial Bank v. Hamilton Bank*, [1903] A. C. 1; *Bank v. Bank*, 18 Wall. 604, 21 L. Ed. 111; *Young v. Lehman*, 63 Ala. 51; *Stanton v. Woods*, 45 Cal. 406, 13 P. 190; *Parke v. Roser*, 67 Ind. 102; *National Bank v. Bank*, 114 N. Y. 28, 20 L. Ed. 111; *City Bank v. National Bank*, 103 N. Y. 203. A *fortiori* these courts have held an acceptor of such a bill liable.

<sup>62</sup> See 4 Harv. L. Rev. at p. 28.

<sup>63</sup> See for further analogies, *infra*, § 1572.

<sup>64</sup> Where a payee in transit

**Section 64.—[LIABILITY OF IRREGULAR INDORSER.]**

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:—

(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.<sup>65</sup>

The subject of this section before the passage of the Act was a matter of great conflict in judicial decisions.<sup>66</sup> It has been said of this section that it “is an otherwise excellent piece of codification, but defective because under subsection 2 a party signing as indorser for the accommodation of an acceptor would not be liable to a drawer-payee, but only to subsequent parties.”<sup>67</sup> The words in the first line of the section “not otherwise a party” do not change the rule that a partner and the partnership to which he belongs

note writes his name on its face under the maker's signature it will be inferred that he signed as indorser not as maker. *E. D. Fisher Lumber &c. Co. v. Robins* (Kan.), 180 Pac. 264. As to the admission of parol evidence, see *supra*, § 644, also *infra*, §§ 1259–1262.

<sup>65</sup> See *Peck v. Eastern*, 74 Conn. 456, 51 Atl. 134; *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847; *Young v. Exchange Bank*, 152 Ky. 293, 153 S. W. 444, Ann. Cas. 1915 B. 148; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. 455; *Overland Auto Co. v. Winters* (Mo. App.), 180 S. W. 561; *Wilson v. Hendee*, 74 N. J. L. 640, 67 Atl. 81; *Roessele v. Lancaster*, 130 N. Y. App. D. 1, 114 N. Y. S. 387, *affd*, without opinion, 205 N. Y. 626, 98 N. E. 1114; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. 875; *Farquhar Co. v. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *McLean*

*v. Bryer*, 24 R. I. 599, 54 Atl. 373. As to the admissibility of parol evidence to show an intent to assume a different liability than that stated in the statute, see *supra*, § 644. In the Illinois Act subsections (1) and (2) are as follows: (1) If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. (2) If the instrument is a note or unaccepted bill payable to bearer, he is liable to all parties subsequent to the maker or drawer. See *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847.

<sup>66</sup> The effect of the various decisions, now happily made unimportant by the Statute, may be found in 1 Ames' Cas. Bills and Notes, 269.

<sup>67</sup> Professor Ames in 14 Harv. L. Rev. 241.

are different persons for the purpose of making and i  
a negotiable instrument.<sup>68</sup> Though the section fixes t  
of a holder against irregular indorsers, the rights of  
ligors on the instrument as against one another may  
be shown by parol.<sup>69</sup>

§ 1162. Warranties implied on negotiation.

Section 65.—[WARRANTY WHERE NEGOTIATION BY  
DELIVERY, ETC.] Every person negotiating an ins  
by delivery or by a qualified indorsement, warrants:-

(1) That the instrument is genuine and in all :  
what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract;

(4) That he has no knowledge of any fact which  
impair the validity of the instrument or render it va

But when the negotiation is by delivery only, the w  
extends in favor of no holder other than the immediat  
feree.

The provisions of subdivision three of this section  
apply to persons negotiating public or corporation sec  
other than bills and notes.<sup>70</sup>

Section 66.—[LIABILITY OF GENERAL INDO  
Every indorser who indorses without qualification  
warrants to all subsequent holders in due course:

<sup>68</sup> Fourth Nat. Bank v. Mead, 216  
Mass. 521, 104 N. E. 377, 52 L. R. A.  
(N. S.) 225.

<sup>69</sup> See *supra*, § 644, *infra*, §§ 1259-  
1262.

<sup>70</sup> The earlier paragraphs of this  
section state the warranties applicable  
to sales of chattels with such variations  
as the nature of the property here in  
question requires. Many authorities  
are collected in Meyer v. Richards, 163  
U. S. 385, 41 L. Ed. 199, 16 Sup. Ct.  
Rep. 1148. See also *supra*, § 977. An  
indorser without recourse is thus liable.  
Miller v. Stewart (Tex. Civ. App.), 214  
S. W. 565. The final paragraph  
codifies the rule of certain decisions

which hold that there is n  
warranty protecting the pu  
securities of the kind name  
prove void or defective beca  
invalidity in the proceedings  
izations of public or corpora  
Otis v. Cullum, 92 U. S. 447,  
46; Meyer v. Richards, 163  
41 L. Ed. 199, 16 S. C. 1148  
Rhodes, 92 Cal. 124, 28 Pac.  
v. Robinson, 50 Mich. 75,  
704; Bank of Commerce v. B  
Mo. App. 124, 175 S. W. 30  
v. Walsh, 12 Neb. 28, 10 N  
Walsh v. Rogers, 15 Neb. 3  
W. 135.

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

(2) That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

**§ 1163. Liabilities of various indorsers.**

**Section 67.—[LIABILITY OF INDORSER WHERE PAPER NEGOTIABLE BY DELIVERY.]** Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

**Section 68.—[ORDER IN WHICH INDORSERS ARE LIABLE.]** As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.<sup>71</sup>

**Section 69.—[LIABILITY OF AN AGENT OR BROKER.]** Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.<sup>72</sup>

**§ 1164. When presentment is necessary.**

**ARTICLE VI**

**PRESENTMENT FOR PAYMENT**

**Section 70.—[EFFECT OF WANT OF DEMAND ON PRINCIPAL DEBTOR.]** Presentment for payment is not necessary in order to charge the person primarily liable on

<sup>71</sup> See *supra*, § 644, *infra*, § 1282.

Gallaudet, 120 N. Y. 298, 24 N. E. 994,

<sup>72</sup> See *Meriden National Bank v.* and *supra*, §§ 284, 285.

the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.<sup>73</sup>

Logically where the promise is to pay at a particular place, presentment at maturity at that place should be a condition precedent to the liability of even a primary party and such is the English rule as to promissory notes<sup>74</sup> and, until changed by statute, likewise in regard to acceptances.<sup>75</sup> But in the United States the previously existing law is accurately stated in this section of the Negotiable Instruments Law.<sup>76</sup>

A demand note literally is conditional upon demand, but the peculiar rule of the common law in regard to conditions of demand<sup>77</sup> has led to the result that a note payable on demand is, so far as the maker's liability is concerned, payable without a demand.<sup>78</sup> Certificates of Deposit, however, have generally been held prior to the Act conditional on presentment.<sup>79</sup>

The effect of failure to make due presentment in discharging drawers and indorsers is familiar and universal law. Less generally had in mind is the effect of such laches in discharging a debt for which the instrument was given.<sup>80</sup>

<sup>73</sup> In the Illinois Act after the word "instrument" are inserted the words: "except in the case of bank notes." In the Kansas, New York and Ohio Acts after the word "maturity" are inserted the words: "and has funds there available for that purpose." In the Wisconsin Act all of the first sentence after the words "on the instrument" is omitted.

<sup>74</sup> 2 Ames Bills and Notes, 792, 793; Bills of Exchange Act, §§ 52 (1) (2); 87 (1).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Cox v. National Bank*, 100 U. S.

704, 713, 25 L. Ed. 739; *Parker v. Stroud*, 98 N. Y. 379, 384, 50 Am. Rep. 685; *Binghamton Pharmacy v. First Nat. Bk.*, 131 Tenn. 711, 176 S. W. 1038. As to the effect of tender given to the maker's ability and willingness to pay, see *Moore v. Alton*, 196 Ala. 158, 70 So. 681.

<sup>77</sup> See *infra*, § 1289.

<sup>78</sup> See *infra*, § 1175.

<sup>79</sup> See the comment on this section of the statute in Brannan, *Neg. Inst. Law* (3d ed.), 430, 524, and *infra*, § 2039.

<sup>80</sup> See *infra*, § 1922a.

**§ 1165. Day for presentment.**

**Section 71.—[PRESENTMENT WHERE INSTRUMENT IS NOT PAYABLE ON DEMAND AND WHERE PAYABLE ON DEMAND.]** Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.<sup>81</sup>

A distinction formerly made in some cases between interest-bearing instruments and those not bearing interest, is under the statute no longer valid as matter of law, though the character of the instrument may affect the question of what is a reasonable time.<sup>82</sup> A check need not be forwarded by the most expeditious route, necessarily. It may be sent through various banks in accordance with mercantile custom.<sup>83</sup>

The last sentence of this section seems to change the law for the worse; the change was doubtless unintentional and due to an effort to condense the language of the English Bills of Exchange Act.<sup>84</sup> Under the words as they stand, it is plainly stated that an indorser of a bill payable on demand will not be discharged however long presentment to the drawer may be delayed, if the bill is indorsed for the last time within a reasonable time prior to presentment.<sup>85</sup> However unreason-

<sup>81</sup> In the Nebraska Act all of the section after the words "reasonable time after its issue" is omitted. In the Vermont Act instead of the last five words of the section are substituted: "after its issue in order to charge the drawer."

<sup>82</sup> See *Anderson v. First Nat. Bank*, 144 Iowa, 251, 122 N. W. 918; *Schlesinger v. Schultz*, 110 N. Y. App. D. 356, 96 N. Y. S. 383.

<sup>83</sup> *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240; *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476.

<sup>84</sup> The English Act provides "Where

it is payable on demand, presentment must be made within a reasonable time after its indorsement in order to charge the indorser, and in case of a bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer."

<sup>85</sup> This construction was laid down in *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451. See also *Plover Sav. Bank v. Moodie*, 135 Ia. 685, 110 N. W. 29, 113 N. W. 476; *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

able the delay may have been, therefore, a further negotiation of the bill and prompt presentment thereafter, it seems, will cure the delay. It should be observed, however, that section 53 states that where an instrument payable on demand is negotiated an unreasonable time after its issue, the purchaser is not a holder in due course. Section 186 lays down a rule as to charging drawers of checks which differs from that of the present section,<sup>86</sup> but section 71 governs the charging of indorsers of checks.

**§ 1166. General requisites of presentment.**

**Section 72.—[WHAT CONSTITUTES A SUFFICIENT PRESENTMENT.]** Presentment for payment, to be sufficient, must be made:—

(1) By the holder, or by some person authorized to receive payment on his behalf;

(2) At a reasonable hour on a business day;

(3) At a proper place as herein defined;

(4) To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made.<sup>87</sup>

**Section 73.—[PLACE OF PRESENTMENT.]** Presentment for payment is made at the proper place:—

(1) Where a place of payment is specified in the instrument and it is there presented;

(2) Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

(3) Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

(4) In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.<sup>88</sup>

<sup>86</sup> See *infra*, § 1209.

<sup>87</sup> See *Fowler Paper Co. v. Best-Jones &c. Co.*, 183 Ill. App. 310; *Columbia-Knickerbocker Trust Co. v. Miller*, 156 N. Y. App. D. 810, 142 N. Y. S. 440, 215 N. Y. 191, 109 N. F.

179, Ann. Cas. 1917 A. 348; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

<sup>88</sup> See *Ryan v. State*, 60 Fla. 25, 53 S. E. 448; *Finch v. Calkins*, 183 Mich. 298, 149 N. W. 1037; *Schlesinger v. Schultz*,

**Section 74.—[INSTRUMENT MUST BE EXHIBITED.]** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.<sup>80</sup>

It is insufficient to call the maker over the telephone,<sup>80</sup> and, though if a holder with the instrument in his possession is personally present before the maker and demands payment which is refused, the actual exhibition of the instrument if not demanded is waived.<sup>91</sup> This is not true where the holder is talking from a distance over the telephone, even though he has the instrument in his possession.<sup>92</sup>

**§ 1167. Presentment in special cases.**

**Section 75.—[PRESENTMENT WHERE INSTRUMENT PAYABLE AT BANK.]** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet at it any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.<sup>93</sup>

**Section 76.—[PRESENTMENT WHERE PRINCIPAL DEBTOR IS DEAD.]** Where a person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his per-

110 N. Y. App. D. 356, 96 N. Y. S. 383; *Baer v. Hoffman*, 150 N. Y. App. D. 473, 135 N. Y. S. 28; *Meyers Co. v. Battle*, 170 N. C. 168, 86 S. E. 1034; *Nelson v. Grondahl*, 13 N. Dak. 363, 100 N. W. 1093; *Norwood Nat. Bank v. Piedmont &c. Co.*, 106 S. Car. 472, 91 S. E. 866.

<sup>80</sup> *Congress Brewing Co. v. Habenicht*, 83 N. Y. App. D. 141, 82 N. Y. S. 481; *State of New York v. Kennedy*, 145 N. Y. App. D. 669, 130 N. Y. S. 412.

<sup>80</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A. 861.

<sup>91</sup> *Lockwood v. Crawford*, 18 Conn. 361; *King v. Crowell*, 61 Me. 244, 14

Am. Rep. 560; *Waring v. Betts*, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890. See also *Hodges v. Blaylock*, 82 Ore. 179, 161 Pac. 396.

<sup>92</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A. 861.

<sup>93</sup> The Nebraska Act ends with the words "banking hours." See *Archerleta v. Johnston*, 53 Colo. 393, 127 Pac. 134; *Columbia-Knickerbocker Trust Co. v. Miller*, 156 N. Y. App. D. 810, 142 N. Y. S. 440, 215 N. Y. 191, 109 N. E. 179, Ann. Cas. 1917 A. 348; *Neckell v. Bradshaw* (Oreg), 183 Pac. 12; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

sonal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.<sup>94</sup>

Section 77.—[PRESENTMENT TO PERSONS AS PARTNERS.] Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Section 78.—[PRESENTMENT TO JOINT DEBITORS.] Where there are several persons, not partners, jointly liable on the instrument, and no place of payment is specified, presentment must be made to them all.<sup>95</sup>

§ 1168. When presentment is excused or delay justifiable

Section 79.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE DRAWER.] Presentment for payment is not required in order to charge the drawer where the holder has no right to expect or require that the drawee or acceptor will pay the instrument.<sup>96</sup>

Section 80.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE INDORSER.] Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be presented.<sup>97</sup>

Section 81.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not in whole or in part to his default, misconduct or negligence. When the

<sup>94</sup> See *Reed v. Spear*, 107 N. Y. App. D. 144, 95 N. Y. S. 1007.

<sup>95</sup> *State of New York Bank v. Kennedy*, 145 N. Y. App. D. 669, 130 N. Y. S. 412.

<sup>96</sup> See *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 708, 28 L. Ed. 866, 5 Sup. Ct. 314; *Simonoff v. Granite City Nat. Bank*, 279 Ill. 246, 116 N. E. 636; *Beauregard v. Knowlton*,

156 Mass. 395, 31 N. E. 389; *A. I. Tucker Co.*, 217 Mass. 360, 1916 F. 8.

<sup>97</sup> See *McDonald v. Lutz*, 170 Fed. Rep. 434, 95 C. C. 170; *Dillon v. Bron*, 96 Kan. 189, 553; *Bergen v. Trimble*, 130 Atl. 137; *Marquardt's*, 95 Atl. 917; *Union v. Sullivan*, 214 N. Y. 332, 108 N. E. 389.

delay ceases to operate, presentment must be made with reasonable diligence.<sup>98</sup>

**Section 82.—[WHEN PRESENTMENT MAY BE DISPENSED WITH.]** Presentment for payment is dispensed with:—

- (1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
- (2) Where the drawee is a fictitious person;
- (3) By waiver of presentment, express or implied.

Insolvency of the maker does not operate as an implied waiver.<sup>99</sup> Lack of presentment may be excused by a new promise;<sup>1</sup> and prior to maturity any words or conduct of a party to be charged inducing the holder to believe presentment would not be required, will operate as a waiver.<sup>2</sup>

### § 1169. Dishonor and its effect.

**Section 83.—[WHEN INSTRUMENT DISHONORED BY NON-PAYMENT.]** The instrument is dishonored by non-payment when,—

- (1) It is duly presented for payment and payment is refused or cannot be obtained; or
- (2) Presentment is excused and the instrument is overdue and unpaid.

An excuse under this section for not making presentment will not excuse failure to give notice of dishonor at maturity to a party secondarily liable;<sup>3</sup> and a waiver of notice does not excuse failure to make presentment.<sup>4</sup>

**Section 84.—[LIABILITY OF PERSON SECONDARILY LIABLE, WHEN INSTRUMENT DISHONORED.]** Sub-

<sup>98</sup> *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 326, 68 L. R. A. 964, 109 Am. St. 925.

<sup>99</sup> *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Reinke v. Wright*, 93 Wis. 368, 67 N. W. 737.

<sup>1</sup> See *supra*, § 157.

<sup>2</sup> See *Worley v. Johnson*, 60 Fla. 294, 53 So. 543, 33 L. R. A. (N. S.) 639; *Simonoff v. Granite City Nat. Bank*, 279 Ill. 248, 116 N. E. 636;

*Sweetser v. Jordan*, 216 Mass. 350, 103 N. E. 905; *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750, 27 L. R. A. (N. S.) 516; *Moll v. Roth*, 7 Oreg. 593, 152 Pac. 235.

<sup>3</sup> *Read v. Spear*, 107 N. Y. App. Div. 144, 94 N. Y. S. 1007.

<sup>4</sup> *Hayward v. Empire State Sugar Co.*, 105 N. Y. App. D. 21, 93 N. Y. S. 449.

ject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

§ 1170. When an instrument matures.

Section 85.—[TIME OF MATURITY.] Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due [or becoming payable] on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.<sup>5</sup>

Section 86.—[TIME; HOW COMPUTED.] Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.<sup>6</sup>

§ 1171. Date of maturity important for three questions.

At this point it is desirable to state more fully when an instrument is overdue. That is necessary for several purposes, and unfortunately under the Common Law an instru-

<sup>5</sup> The words in brackets [or becoming payable] have been inserted for the sake of clearness. They are found in the Florida, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington Acts. This section having twice used the word "payable" then uses the words "falling due." This has raised doubts in the minds of some as to the rule if Friday is a legal holiday and an instrument matures on that day. These words were inserted to

remove any possible doubt, though they seem unnecessary. Sight drafts are excepted from abolition of days of grace in Massachusetts, North Carolina and New Hampshire. The provision of the section in regard to Saturday is omitted in Arizona, Kentucky, Vermont and Wisconsin. The section is further amended in Iowa and Massachusetts. See for a discussion of this section, 23 Harv. L. Rev. 603; 26 *id.*, 592.

<sup>6</sup> A note dated Nov. 8, 1908, payable in twelve months must be presented on Nov. 8, 1909. *Lewy v. Wilkinson*, 135 La. 105, 64 So. 1003.

ment may not be overdue for all these purposes at the same moment. The first question is—When can the holder sue the party primarily liable? The second question is—When can the holder give effective notice of dishonor to parties secondarily liable that the instrument has been dishonored at maturity? The third question is—After what moment does the instrument become subject to personal defences when purchased even by a *bona fide* purchaser for value.

**§ 1172. In Europe an instrument is overdue for all purposes at the same time.**

Under the practice which prevails on the continent of Europe, of presentment by a notary who marks on the face of a bill the fact of its dishonor or of its payment on presentment, the difficulties that beset our law in regard to this matter do not occur. The answers to each of these three questions there will always be the same. As soon as there is a right of action against the maker then will always be the time to give notice, and thereafter the instrument will always pass subject to equities; and this time will be the moment on the day of maturity when the notary has thus indicated that the instrument is dishonored.

**§ 1173. When right of action accrues in the United States.**

It is the rule in simple contracts that when a man contracts to do something on a given day he has until the last minute of that day to satisfy his obligation. That is true both of contracts to pay money and of contracts to do other things.<sup>7</sup> If, therefore, by a simple contract one agrees to pay \$1,000 on the 2d of January, he cannot be sued on that obligation until after the last minute of the 2d of January has expired, for until that last minute it is possible he may fulfill his contract. The result is that a right of action will not accrue until the 3d of January. That principle, unfortunately, has been applied rather generally to negotiable instruments. If a note is by its terms payable on the 2d of January the gen-

<sup>7</sup> Webb v. Fairmaner, 3 M. & W. 473, *supra*, § 857.

eral rule is that no action can be begun against the maker of the instrument until the 3d of January.<sup>8</sup>

This is probably contrary to the theory and custom of bankers and merchants. Their theory is that the maker of the instrument agrees that he will pay it on presentment on the 2d of January, that the maker is not entitled to demand payment until the minute of the day, that he must be ready at the beginning of the business day, and that at whatever hour on that day the holder presents that instrument he is entitled to payment. The law in some States has to some extent recognized this custom. If there is an actual presentment on the 2d of January a right of action against the maker it is held arises immediately in favor of the holder.

But it is law generally, in these States as well as elsewhere, that if presentment is not made on the 2d of January, under the Negotiable Instruments Law there is no right of presentment except to charge the indorsers, and that a note without indorsers need not be presented) the maker is not liable to suit until the 3d of January;<sup>10</sup> unless the instrument is payable at a bank. In that event it has been held logically enough by some courts that as the maker could comply with his promise during banking hours, a suit brought on the day of maturity after banking hours, was premature.<sup>11</sup> Even in such a case the general rule allowing the maker the full day of maturity is supported by other cases.

<sup>8</sup> *Kennedy v. Thomas*, [1894] 2 Q. B. 759. And see cases in the following notes, and *supra*, § 857.

<sup>9</sup> *Leftley v. Mills*, 4 T. R. 170; *Heise v. Bumpass*, 40 Ark. 545; *Veazie Bank v. Winn*, 40 Me. 62; *Staples v. Franklin Bank*, 1 Met. 43, 35 Am. Dec. 345; *McKenzie v. Durant*, 9 Rich. 61; *Coleman v. Ewing*, 4 Humph. 241. But even in such a case some courts hold that no right of action arises until January 3. *Sutcliffe v. Humphreys*, 58 N. J. L. 42, 32 Atl. 706; *Oothout v. Ballard*, 41 Barb. 33. Under Sec. 66 of the Act, the indorser, it is said, engages that the maker shall pay on presentment. It seems possible, therefore, that a right of action should

accrue against the indorser on the day of maturity if he is notified of presentment. It would be odd if there should be no right of action against the indorser before there is against the maker.

<sup>10</sup> *Benson v. Adams*, 69 Ind. 220; *Am. Rep. 220*; *Sturz v. Fisher*, App. Div. 457, 459, 56 N. Y. App. Div. 241, 78 N. Y. S. 1061.

<sup>11</sup> *Sabin v. Burke*, 4 Ida. 283, 352; *Exchange Bank v. Bank of America*, 132 Mass. 147, 148; *reys v. Sutcliffe*, 192 Pa. 336, 338, 954, 73 Am. St. Rep. 819; *Bank v. Lay*, 80 Va. 436, 440.

<sup>12</sup> *Benson v. Adams*, 69 Ind. 220; *Am. Rep. 220*; *Sutcliffe v. Hu*

The day of maturity is also affected by Sundays and holidays. If the day of maturity falls on Sunday or a holiday, the instrument is not payable until the next business day, and time instruments payable on Saturday must also be presented on the next business day in order to charge secondary parties.<sup>13</sup>

**§ 1174. When an instrument is overdue for other purposes.**

The second inquiry is this: When is an instrument overdue for the purpose of charging indorsers? For that purpose it is everywhere overdue as soon as it is presented and dishonored on the day of maturity (Sections 71, 83, 102), and the third inquiry is, when is it overdue for the purpose of letting in equities against a purchaser for value of the instrument? Everywhere but in Massachusetts, so far as it has been decided, the instrument is overdue for this purpose only on the day after that on which it falls due, that is, on the 3d of January, in the case above supposed.<sup>14</sup>

A purchaser on the 2d of January, unless he had notice that the instrument had been presented and dishonored, would be a holder in due course. In Massachusetts, however, one who purchases on the 2d of January is not a holder in due course,<sup>15</sup> unless Section 52 of the Negotiable Instruments Law has changed the law previously existing in that State.

**§ 1175. When right of action accrues on demand paper.**

A more troublesome question than that concerning the day of maturity of time paper is the day of maturity of demand paper, and here again the distinction must be made clear between these several questions of when a right of action arises, when the instrument is subject to equities, and when notice may be given to indorsers. On demand paper a right of action against the maker arises immediately as soon as it is delivered. By the terms of the paper it might be supposed

58 N. J. L. 42, 32 Atl. 706; *Smith v. Aylesworth*, 40 Barb. 104; *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615.

<sup>13</sup> See *supra*, § 1170.

<sup>14</sup> *Savings Bank v. Bates*, 8 Conn.

505; *Walter v. Kirk*, 14 Ill. 55; *Goodpaster v. Voris*, 8 Ia. 334, 74 Am. Dec. 313; *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Crosby v. Grant*, 36 N. H. 273.

<sup>15</sup> *Pine v. Smith*, 11 Gray, 38.

that demand was a prerequisite to such a right of action, and on theory it ought to be, but, as has been said,<sup>16</sup> in the United States and in England it is not.<sup>17</sup>

**§ 1176. Maturity of demand paper to charge indorsers.**

The holder may make a demand on the maker within a reasonable time after the issue of the instrument for the purpose of charging indorsers, the instrument maturing at any time within that limit at which the holder wishes to present it. (Section 71 of the Act). That is, he may demand payment at once of the party primarily liable, and on his refusal to pay and notice to the indorser, he will acquire a right of action against the latter (Section 66), or he may defer demand until a reasonable time has nearly elapsed. The limit of time within which a purchaser of the instrument can acquire a title free of equitable defences is the same at common law,<sup>18</sup> and remains the same under the statute unless Section 53 and the last clause of Section 71 when taken together produce a different result.<sup>19</sup>

A check negotiated the day after its issue is certainly negotiated within a reasonable time,<sup>20</sup> and if a holiday intervenes, this will not make the following day unreasonable.<sup>21</sup> A cashier's check not negotiated until five days after its issue was held negotiated within a reasonable time.<sup>22</sup> The rule

<sup>16</sup> *Supra*, § 1164.

<sup>17</sup> *Norton v. Ellam*, 2 M. & W. 461; *Hunter v. Wood*, 54 Ala. 71; *Bell v. Sackett*, 38 Cal. 407; *Fankboner v. Fankboner*, 20 Ind. 62; *Burnham v. Allen*, 1 Gray, 496; *Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540; *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *Hyman v. Doyle*, 53 N. Y. Misc. 597, 103 N. Y. S. 778; *Shuman v. Citizens' Bank*, 27 N. Dak. 599, 147 N. W. 388, L. R. A. 1915 A. 728; *Union Central Life Ins. Co. v. Curtis*, 35 Ohio St. 357; *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69; *Dawley v. Wheeler*, 52 Vt. 574.

In *Hebblethwaite v. Flint*, 185 N. Y. App. D. 249, 173 N. Y. S. 81, the court stated that if a demand note was non-

negotiable it must be presented to charge the maker; but the common-law rule that promises to pay on demand are payable without a demand does not depend upon negotiability. See *infra*, § 1289.

<sup>18</sup> In Massachusetts prior to the passage of the Negotiable Instruments Law, a statutory rule subjected all demand notes to personal defences whenever transferred.

<sup>19</sup> See *supra*, § 1165.

<sup>20</sup> *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747.

<sup>21</sup> *Asbury v. Taube*, 151 Ky. 142, 151 S. W. 372.

<sup>22</sup> *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

in regard to demand notes is more liberal than in regard to demand bills. The facts of each case must be considered, but perhaps two to three months seems the ordinary time permissible for notes.<sup>23</sup>

In several States, prior to the passage of the Negotiable Instruments Law, statutes fixed the length of a reasonable time;<sup>24</sup> but the Negotiable Instruments Law has repealed such statutes.<sup>25</sup> In Massachusetts, however, it has been held that a usage had grown up making sixty days (the period previously fixed by the local statute) a reasonable time within which demand must be made on the maker, in order to charge an indorser on such a note.<sup>26</sup> There is great advantage of certainty in having the limits of a reasonable time exactly defined.

There can be no question that Section 71 has reversed an exceptional doctrine prevailing in New York to the effect that if a note payable on demand contained an express provision for the payment of interest it was intended as a "continuing security" and an indorser would not be discharged by failure to make demand so long as the note remained an enforceable obligation.<sup>27</sup>

### § 1177. Domiciled notes.

**Section 87.—[RULE WHERE INSTRUMENT PAYABLE AT BANK.]** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.<sup>28</sup>

<sup>23</sup> See *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952; *Ranger v. Cary*, 1 Metc. 369; *Stevens v. Bruce*, 21 Pick. 193; *McAdam v. Grand Forks Mercantile Co.*, 24 N. Dak. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 246; *Sice v. Cunningham*, 1 Cow. 397, 404.

<sup>24</sup> *E. g.*, in Connecticut, Massachusetts, Minnesota, Vermont.

<sup>25</sup> *Hampton v. Miller*, 78 Conn. 267, 271, 61 Atl. 952; *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987.

<sup>26</sup> *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987; *Plymouth County Trust*

*Co. v. Scanlan*, 227 Mass. 71, 116 N. E. 468.

<sup>27</sup> The prior law is indicated by *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231. As to the effect of the statute, see *supra*, § 1165.

<sup>28</sup> This section is omitted in Illinois, Nebraska and South Dakota, and has been repealed in Kansas. In Minnesota the section is retained but instead of the words "it is equivalent" are substituted "it shall not be equiva-



has been materially changed by the Negotiable Instruments Law. At common law the bank had at most but a bare authority to pay a note domiciled there. Now, by express provision, such an instrument is equivalent to an order on the bank to pay the same.<sup>36</sup> This is in effect the creation of negotiable paper similar to a check, differing only in that it is payable at a future date. And there is not even this distinction when the note is payable on demand. In both cases the business understanding is that the debtor will have sufficient funds at the bank, and it is the duty of the bank to apply such funds to payment of the instrument. It might well be urged, therefore, that the statute has, in substantial effect, put the maker of a domiciled note in a position of secondary liability similar to that of the drawer of a check.”<sup>37</sup>

### § 1178. Payment.

**Section 88.—[WHAT CONSTITUTES PAYMENT IN DUE COURSE.]** Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Payment before maturity is only a personal defence even though made to the holder,<sup>38</sup> and if made to one who is neither the holder nor authorized by him to receive payment is totally inoperative,<sup>39</sup> unless the party paying acquires the instrument properly indorsed, and in effect becomes a purchaser of it. Payment at or after maturity is in effect an absolute defence

<sup>36</sup> Citing Brannan, *Negotiable Instruments Law*, (3d ed.) § 87.

<sup>37</sup> This view is supported by the cases of *New England Nat. Bank v. Dick*, 84 Kans. 252, 114 Pac. 378; *Baldwin's Bank v. Smith*, 215 N. Y. 76, 109 N. E. 138, Ann. Cas. 1917 A. 500. But these decisions seem inconsistent with Sec. 70 of the statute, unless it can be said that the maker of a note is not the “person primarily liable” if the instrument is payable at a bank—a somewhat extreme contention. The

New York decision is criticised in Crawford's *Negotiable Instruments Law* (4th ed.), 162. See also *Binghamton Pharmacy v. First Nat. Bank*, 131 Tenn. 711, 176 S. W. 1038.

<sup>38</sup> *Burbridge v. Manners*, 3 Camp. 193; *Watson v. Wyman*, 161 Mass. 96, 99, 36 N. E. 692.

<sup>39</sup> *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Hayden v. Speakman*, 20 N. Mex. 513, 150 Pac. 292. But see *Bainbridge v. Louisville*, 83 Ky. 285, 4 Am. St. Rep. 153.

if made to the party entitled to receive it, since there is no new holder in due course after maturity. But conclusive proof that a person is entitled to receive is the contemporaneous surrender of the instrument indorsed,<sup>40</sup> and a payment made to one who is not the holder is inoperative.<sup>41</sup> On the other hand, payment before or after maturity to a holder is a discharge by the words, of section 88; but the party paying will not be charged if he has notice that the holder is not equitably entitled to payment.<sup>42</sup>

**§ 1179. Requirement of notice, and its effect.**

**ARTICLE VII**

**NOTICE OF DISHONOR**

**Section 89.—[TO WHOM NOTICE OF DISHONOR MUST BE GIVEN.]** Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

By this section, following the rule of the law, proper notice is made a condition precedent of any action on the instrument on the part of a drawer or an indorser. Failure to give notice may also deprive the holder of his right to resort to a debt for which the instrument was given. A guarantor is not entitled to notice of dishonor.<sup>43</sup> The same rule applies to an accommodation maker.<sup>45</sup>

<sup>40</sup> *Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 423.

<sup>41</sup> *Adair v. Lenox*, 15 Oreg. 489, 16 Pac. 182.

<sup>42</sup> *Hinckley v. Union Pac. R.*, 129 Mass. 52, 37 Am. Rep. 297.

<sup>43</sup> By the French Commercial Code (Arts. 168-170), though lack of notice discharges indorsers, it does not discharge the drawer unless he shows that the drawee had sufficient effects of the

drawer to meet the bill when presented. Under the German Exchange Law (Art. 45), failure to give notice discharges the holder only of interest, unless the omission causes loss.

<sup>44</sup> See *infra*, § 1922a.

<sup>45</sup> *Roberts v. Hawkins*, 566, 38 N. W. 575; *H. O'Brien*, 37 Minn. 306, 34 N. W. 100; *Brown v. Curtiss*, 2 N. Y. 100.

<sup>46</sup> *First State Bank v. V.*

**Section 90.—[BY WHOM GIVEN.]** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

**Section 91.—[NOTICE GIVEN BY AGENT.]** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.<sup>46</sup>

**Section 92.—[EFFECT OF NOTICE GIVEN ON BEHALF OF HOLDER.]** Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.<sup>47</sup>

**Section 93.—[EFFECT WHERE NOTICE IS GIVEN BY PARTY ENTITLED THERETO.]** Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

**Section 94.—[WHEN AGENT MAY GIVE NOTICE.]** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice himself the same time for giving notice as if the agent had been an independent holder.<sup>48</sup>

## § 1180. Form of notice.

**Section 95.—[WHEN NOTICE SUFFICIENT.]** A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communica-

Ky. 143, 175 S. W. 10; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

<sup>46</sup> See *Hooper v. Herring*, 14 Ala. App. 455, 70 So. 308; *Traders' Nat. Bank v. Jones*, 104 N. Y. App. D. 433, 93 N. Y. S. 768.

<sup>47</sup> *Piedmont Carolina Ry. Co. v. Shaw*, 223 Fed. 973, 138 C. C. A. 227.

<sup>48</sup> *Gleason v. Thayer*, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915 B. 1069. See also *Fielding v. Corry*, [1898] 1 Q. B. 268; *Blue Ribbon Garage v. Baldwin*, 91 Conn. 674, 101 Atl. 83.

tion. A misdescription of the instrument does not void notice unless the party to whom the notice is given is misled thereby.<sup>49</sup>

**Section 96.—[FORM OF NOTICE.]** The notice in writing or merely oral and may be given in a form which sufficiently identifies the instrument, and that it has been dishonored by non-acceptance or payment. It may in all cases be given by delivery personally or through the mails.<sup>50</sup>

Though the form of notice is legally immaterial, it is obviously desirable for purposes of easy proof to have a written notice. Mere knowledge of dishonor is not enough to make a party secondarily liable. Notification is a conditional obligation.<sup>51</sup>

**§ 1181. To whom notice must be given.**

**Section 97.—[TO WHOM NOTICE MAY BE GIVEN.]** Notice of dishonor may be given either to the party himself or to his agent in that behalf.

**Section 98.—[NOTICE WHERE PARTY IS DEAD.]** Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he cannot be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.<sup>52</sup>

**Section 99.—[NOTICE TO PARTNERS.]** Where parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

**Section 100.—[NOTICE TO PERSONS JOINTLY LIABLE.]** Notice to joint parties who are not partners

<sup>49</sup> Under the Kentucky Act, the notice must be written and signed.

<sup>50</sup> Notice by telephone is sufficient. *Blue Ribbon Garage Co. v. Baldwin*, 91 Conn. 674, 101 Atl. 83; *American Nat. Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597.

<sup>51</sup> *Marshall v. Sonneman*, 216 Pa. 65, 64 Atl. 874; *McVeigh v. Bank of*

*Old Dominion*, 26 Gratt. 18; *Old Dominion v. McVeigh*, 546.

<sup>52</sup> See *Second Nat. Bank v. Jones*, 99 N. J. L. 531, 103 Atl. 862.

<sup>53</sup> *Feigenspan v. McDowell*, 101 Mass. 341, 87 N. E. 624; *Nat. Bank v. Jones*, 104 N. E. 433, 93 N. Y. S. 768.

be given to each of them, unless one of them has authority to receive such notice for the others.<sup>54</sup>

Section 101.—[NOTICE TO BANKRUPT.] Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 1182. Time allowed for notice.

Section 102.—[TIME WITHIN WHICH NOTICE MUST BE GIVEN.] Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Section 103.—[WHERE PARTIES RESIDE IN SAME PLACE.] Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

(1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

(2) If given at his residence, it must be given before the usual hours of rest on the day following.

(3) If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Section 104.—[WHERE PARTIES RESIDE IN DIFFERENT PLACES.] Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

(1) If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.<sup>55</sup>

(2) If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

<sup>54</sup> See *supra*, § 333.

113, 115 N. E. 292; Second Nat. Bank

<sup>55</sup> See *Harris v. Baker*, 226 Mass. 531, 103 Atl. 862.

§ 1183. Notice properly sent is effective, though not

Section 105.—[WHEN SENDER DEEMED TO HAVE GIVEN DUE NOTICE.] Where notice of dishonor is addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding miscarriage in the mails.<sup>56</sup>

The notice must be duly stamped as well as "received and deposited;"<sup>57</sup> and evidence that the notice was received is relevant to the issue whether it was sent.<sup>58</sup>

Section 106.—[DEPOSIT IN POST-OFFICE; WHEN NOTICE IS DEEMED TO HAVE BEEN GIVEN.] Notice is deemed to have been given in the post-office when deposited in any branch post-office or in any letter box under the control of the post-department.

§ 1184. Time for charging successive parties.

Section 107.—[NOTICE TO ANTECEDENT PARTIES.] Where a party receives notice of dishonor, after the receipt of such notice, the same time is allowed for notice to antecedent parties that the holder has after receipt of notice.

The rule that when notice is properly given to a party secondarily liable, he has the same time to give notice to antecedent parties raises rather a curious situation. Suppose the holder gave prompt notice to the last of five indorsers, and also gave notice, but not promptly, to the first indorser; the latter notice is ineffective. But if notice had been given by the last indorser to the other four, and so in turn each indorser seasonably notifies the one before him until finally the first indorser is notified by the last, that is a good notice to the first indorser, although given a week or a fortnight later than the other one which was bad notice; and under section 93, that second notice

<sup>56</sup> See *Second Nat. Bank v. Smith*, 126, 120 N. W. 820, 131 A. 91 N. J. L. 531, 103 Atl. 862. 1040.

<sup>57</sup> *First Nat. Bank v. Miller*, 139 Wis.

<sup>58</sup> *First Nat. Bank v. Case Co.*, 187 Mich. 224,

not only inure to the benefit of the indorser who sent it, but it would inure to the benefit of the holder. There is one method of sending notice to earlier indorsers which was upheld in a case decided in Massachusetts some years ago, and perhaps the same method is in use now; that is, by mailing notices to all the indorsers under one cover to the last indorser, leaving it to him to forward the notices to the earlier indorsers. Of course, if he does so promptly there is no doubt that such notices are timely (Section 107) and inure to the benefit of the holder, but it was further held in the case in question to be a proper method of notification, charging all the indorsers, even though the last indorser did not forward the notices to the earlier indorsers.<sup>59</sup>

It may be doubted if the Massachusetts decision would generally be accepted.<sup>60</sup> It is obvious that if the risk of the notices being forwarded is on the original sender, the method in question is a very unsafe one to adopt in charging parties secondarily liable.

#### § 1185. Address to which notice must be sent.

**Section 108.—[WHERE NOTICE MUST BE SENT.]** Where a party has added an address to his signature, notice of dishonor must be sent to that address;<sup>61</sup> but if he has not given such address, then the notice must be sent as follows:—

(1) Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or <sup>62</sup>

722; *Union Bank v. Deshel*, 139 N. Y. App. D. 217, 123 N. Y. S. 585. Cf. *First Nat. Bank v. Delone*, 254 Pa. 409, 98 Atl. 1042.

<sup>59</sup> *Wamesit Bank v. Buttrick*, 11 Gray, 387.

<sup>60</sup> See *Vaughan v. Potter*, 131 Ill. App. 334; *Van Brunt v. Vaughn*, 47 Ia. 145, 29 Am. Rep. 468; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; *Stix v. Matthews*, 63 Mo. 371, 375; *Fuller Buggy Co. v. Waldron*, 112 N. Y. App. D. 814, 99 N. Y. S. 561; *Lawson v. Farmers' Bank*, 1 Ohio St. 206.

<sup>61</sup> See *Lankofsky v. Raymond*, 217 Mass. 98, 104 N. E. 489. Notice sent to a place which the indorser said, at the time when the note was made, was his address, is sufficient to charge him. *Archuleta v. Johnston*, 53 Col. 393, 127 Pac. 134.

<sup>62</sup> Notice sent addressed to an indorser at "New York City" without more was held sufficient though his exact address could have been found in the telephone directory. *McGrath v. Fancolini*, 92 N. Y. Misc. 359, 156 N. Y. S. 981.

(2) If he live in one place, and have his place of in another, notice may be sent to either place; or

(3) If he is sojourning in another place, notice sent to the place where he is so sojourning.

But where the notice is actually received by t within the time specified in this act, it will be s though not sent in accordance with the requirer this section..

§ 1186. Effect of waiver.

Section 109.—[WAIVER OF NOTICE.] Notice honor may be waived, either before the time of giving has arrived, or after the omission to give due notice, waiver may be express or implied.<sup>63</sup>

Section 110.—[WHOM AFFECTED BY W.] Where the waiver is embodied in the instrument it is binding upon all parties; but where it is written the signature of an indorser, it binds him only.<sup>64</sup>

Section 111.—[WAIVER OF PROTEST.] A waiver protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a not only of a formal protest, but also of presentment notice of dishonor.

“The liability of an indorser is conditional, the condition being first, that at the maturity of the note there shall be demand upon the maker for payment, and second, that if the note be not then paid due notice thereof shall be given to the indorser. And these two conditions are distinct.”

<sup>63</sup> See *supra*, §§ 157, 689. Recent illustrations of waiver implied from previous dealings are found in *Simonoff v. Granite City Nat. Bank*, 279 Ill. 248, 116 N. E. 636; *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997. Whether waiver of presentment involves waiver of notice is disputed. See this section *ad fin.*

<sup>64</sup> *Owensboro Sav. Bank v. Haynes*, 143 Ky. 534, 136 S. W. 1004; *Atkins v. Dixie Fair Co.*, 135 La. 622, 65 So.

762. Where there was a waiver on the back of the note, several indorsers who signed the back of the instrument at the time of delivery were each held bound by the waiver. *Central Nat. Bank v. Bankville &c. Co.*, 79 W. Va. 782, 808. And in *Hurlbut v. Quigley*, 180 Pac. 613, the words “waive presentment &c.” written after the names of several indorsers constituted a joint and several promise.

independent of each other. Either can be waived and the other insisted upon.”<sup>65</sup> Protest is an added requisite in case of a foreign bill. Logically, therefore, a waiver of protest should waive neither presentment nor notice; but protest is so often inexactly used by business men to express presentment and notice as well as a technical protest that the statute has accepted this use of language and given effect to it.<sup>66</sup>

**§ 1187. Excuses for failure or delay in giving notice.**

**Section 112.—[WHEN NOTICE IS DISPENSED WITH.]** Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

**Section 113.—[DELAY IN GIVING NOTICE: HOW EXCUSED.]** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to this default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

**Section 114.—[WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.]** Notice of dishonor is not required to be given to the drawer in either of the following cases:—

- (1) Where the drawer and drawee are the same person;
- (2) When the drawee is a fictitious person or a person not having capacity to contract;
- (3) When the drawer is the person to whom the instrument is presented for payment;
- (4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
- (5) Where the drawer has countermanded payment.

**Section 115.—[WHEN NOTICE NEED NOT BE GIVEN TO INDORSER.]** Notice of dishonor is not required to be given to an indorser in either of the following cases:—

- (1) Where the drawee is a fictitious person or a person

<sup>65</sup> *Hall v. Crane*, 213 Mass. 326, 327, 100 N. E. 554. See also *Baer v. Hoffman*, 150 N. Y. App. D. 473, 135 N. Y. S. 28. But see *contra*, *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886.

<sup>66</sup> *Atkinson v. Skidmore*, 152 Ky. 413, 153 S. W. 456; *Frank-Taylor-Kendrick Co. v. Voissement*, 142 La. 973, 77 So. 895.

§ 1188 **BILLS OF EXCHANGE AND PROMISSORY NOTE**

not having capacity to contract, and the indorser was of the fact at the time he indorsed the instrument;

(2) Where the indorser is the person to whom the instrument is presented for payment;

(3) Where the instrument was made or accepted for accommodation.

§ 1188. **Effect of notice of non-acceptance; protest.**

Section 116.—[NOTICE OF NON-PAYMENT ACCEPTANCE REFUSED.] Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless meantime the instrument has been accepted.

Section 117.—[EFFECT OF OMISSION TO GIVE NOTICE OF NON-ACCEPTANCE.] An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Section 118.—[WHEN PROTEST NEED NOT BE MADE; WHEN MUST BE MADE.] Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be. Protest is not required except in the case of foreign bills of exchange.<sup>68</sup>

§ 1189. **Discharge of instrument.**

**ARTICLE VIII**

**DISCHARGE OF NEGOTIABLE INSTRUMENT**

Section 119.—[INSTRUMENT; HOW DISCHARGED.] A negotiable instrument is discharged:—

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accountable.

<sup>67</sup> In the Wisconsin Act these words are added "but this shall not be construed to revive any liability discharged by such omission."

<sup>68</sup> Protest is not conclusive without due presentment and notice. *Man v. Brazier*, 198 Mass. 461, 856.

dated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right;<sup>69</sup>

It has been frequently pointed out<sup>70</sup> that paragraph four is a blunder. An accord and satisfaction, or payment before maturity, will discharge a simple contract for the payment of money, but unless the Statute has changed the law, will not discharge a negotiable instrument against a subsequent holder in due course.<sup>71</sup>

Subsections 1 and 5 introduce a question of suretyship by the use of the term "principal debtor." The words "person primarily liable" should have been inserted here.

Subsection 2 covers the case of a principal debtor who is not the party primarily liable, and subsections 1 and 5 should have been confined to dealing with the person primarily liable on the instrument whether he has assumed that position for accommodation or not. When an accommodation maker pays a note at maturity the note is legally discharged. He will have a right to recover from the accommodated indorser, not, however, on the note but on a collateral obligation; and if equity should regard the note as still alive for the purpose of subrogating the surety to the creditor's claim against the principal debtor,<sup>72</sup> this should be regarded as effective only between these parties on equitable principles.

### § 1190. Discharge of individual parties.

Section 120.—[WHEN PERSONS SECONDARILY LIABLE ON, DISCHARGED.] A person secondarily liable on the instrument is discharged:—

(1) By any act which discharges the instrument;

<sup>69</sup> In the Illinois Act subsection (4) is omitted.

<sup>70</sup> *E. g.*, 26 Harv. L. Rev. 588, 593.

<sup>71</sup> Daniel, Neg. Inst., § 1233; *supra*, § 1178.

<sup>72</sup> In *Walker v. Chicago, etc., R. Co.*, 277 Ill. 451, 115 N. E. 659, however, it was held that a joint maker of a note who was in fact a surety might buy the note without thereby discharging it.



probable that the Negotiable Instruments Law will be construed as effecting a change in the law where indulgence is given to a secondary party who, as between himself and an antecedent party is a principal debtor.<sup>74-75</sup>

**§ 1191. Effect of payment by a party secondarily liable.**

**Section 121.—[RIGHT OF PARTY WHO DISCHARGES INSTRUMENT.]** Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:—

(1) Where it is payable to the order of a third person, and has been paid by the drawer; and

(2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.<sup>76</sup>

The provision of this section is literally inapplicable where the party secondarily liable who pays is an anomalous indorser who was liable to the payee under section 64 (1), since previous to the payment the indorser has never had a title to which he can be remitted.<sup>77</sup> The last clause of the section should properly have been "where it was made, accepted or indorsed for accommodation," etc., but in spite of the failure to cover expressly the case of an accommodated indorser, payment by such a person would extinguish the instrument.<sup>78</sup>

**§ 1192. Renunciation without consideration.**

**Section 122.—[RENUNCIATION BY HOLDER.]** The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the

<sup>74-75</sup> See *infra*, § 1260.

<sup>76</sup> See *Assets Realization Co. v. Mercantile Nat. Bank*, 167 N. Y. App. Div. 757, 153 N. Y. S. 156.

<sup>77</sup> *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671; but see *Graves v. Neeves*,

183 Ill. App. 235; *Lill v. Gleason*, 92 Kan. 754, 142 Pac. 287; *Pease v. Tyler*, 78 Wash. 24, 138 Pac. 310.

<sup>78</sup> *Josephsohn v. Gens*, 85 N. Y. Misc. 372, 147 N. Y. S. 451. See Secs. 119, 196.



alteration, he may enforce payment thereof according to its original tenor.<sup>84</sup>

**Section 125.—[WHAT CONSTITUTES A MATERIAL ALTERATION.]** Any alteration which changes,—

- (1) The date;
- (2) The sum payable, either for principal or interest;
- (3) The time or place of payment;
- (4) The number or the relations of the parties;
- (5) The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.<sup>85</sup>

§ 1194. Special rules governing bills of exchange.

## TITLE II

### BILLS OF EXCHANGE

#### ARTICLE I

##### FORM AND INTERPRETATION

**Section 126.—[BILL OF EXCHANGE DEFINED.]** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

**Section 127.—[BILL NOT AN ASSIGNMENT OF FUNDS IN HANDS OF DRAWEE.]** A bill of itself does not operate as an assignment of the funds in the hands of the drawee

<sup>84</sup>Smith, *Kline & French Co. v. Freeman* (N. J. L.), 106 Atl. 22. In the Illinois Act the words "fraudulently or" (probably "and" was intended), are inserted before "materially" in line one and the words "by the holder" after "altered" in the

same sentence. In the Wisconsin Act the words "orally or in writing" are inserted after "assented" in the fifth line. See comment on this section, *infra*, § 1892.

<sup>85</sup>See *infra*, §§ 1902-1908.

**§ 1195 BILLS OF EXCHANGE AND PROMISSORY NOTE**

available for the payment thereof, and the drawee is liable on the bill unless and until he accepts the same.

**Section 128.—[BILL ADDRESSED TO MORE THAN ONE DRAWEE.]** A bill may be addressed to two or more drawees jointly, whether they are partners or not, or to two or more drawees in the alternative or in succession.

**Section 129.—[INLAND AND FOREIGN BILLS OF EXCHANGE.]** An inland bill of exchange is a bill which on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

**Section 130.—[WHEN BILL MAY BE TREATED AS A PROMISSORY NOTE.]** Where in a bill the drawer and drawee are the same person, or where the drawee is a partner of the drawer, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

**Section 131.—[REFEREE IN CASE OF NEED.]** The drawer of a bill and any indorser may insert the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by non-acceptance or non-payment. Such person is called a referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think proper.

**§ 1195. What amounts to an acceptance.**

## **ARTICLE II**

### **ACCEPTANCE**

**Section 132.—[ACCEPTANCE; HOW MADE, ETC.]** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express any condition, and the drawee will perform his promise by any other means than the payment of money.

<sup>1</sup> See *supra*, §§ 425, 426.

Prior to the enactment of the statute oral acceptances were often held good,<sup>87</sup> but this was doubtless opposed to the best mercantile understanding, and, except as provided by Section 137, has been wisely changed by the statute.<sup>88</sup> A written admission that the drawee is indebted in an amount equal to the face of a bill drawn on him, is not an acceptance.<sup>89</sup>

**Section 133.—[HOLDER ENTITLED TO ACCEPTANCE ON FACE OF BILL.]** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored.

**Section 134.—[ACCEPTANCE BY SEPARATE INSTRUMENT.]** Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.<sup>90</sup>

**Section 135.—[PROMISE TO ACCEPT; WHEN EQUIVALENT TO ACCEPTANCE.]** An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who upon the faith thereof, receives the bill for value.<sup>91</sup>

<sup>87</sup> See *Scudder v. Union Bank*, 91 U. S. 406, 23 L. Ed. 245; *Hall v. Cordell*, 142 U. S. 116, 35 L. Ed. 956, 12 Sup. Ct. 154; *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. Rep. 18; *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517.

<sup>88</sup> *Faircloth-Byrd, etc., Co. v. Adkinson*, 167 Ala. 344, 52 So. 419; *Rambo v. First State Bank*, 88 Kan. 257, 128 Pac. 182; *Clayton Town Site Co. v. Clayton Drug Co.*, 20 N. Mex. 185, 147 Pac. 460; *Izzo v. Ludington*, 79 N. Y. App. Div. 272, 79 N. Y. S. 744; *Fredrick v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570. Cf. *Gruenther v. Bank of Monroe*, 90 Neb. 280, 133 N. W. 402.

<sup>89</sup> *Plaza Farmers' Union W. & E. Co. v. Ryan*, 78 Wash. 124, 138 Pac. 651. See also *Carmichael v. Tishomingo Banking Co.*, (Mo. App. 1917), 191 S. W. 1043.

<sup>90</sup> See *Jones v. Clumpler*, 119 Va. 143, 89 S. E. 232.

<sup>91</sup> A promise by telegraph is in writing within the meaning of the statute. *Oil Well Supply Co. v. MacMurphey*, 119 Minn. 500, 138 N. W. 784. Even though the sender telephoned the message to the operator. *Selma Sav. Bank v. Webster County Bank (Ky.)*, 206 S. W. 870. See also the following cases where the writing was held to amount to an acceptance. *North Atchison Bank v. Garretson*, 51 Fed. 168; *First Nat. Bank v. First Nat. Bank*, 210 Fed. 542; *Lehnhard v. Sidway*, 160 Mo. App. 83, 141 S. W. 430; *State Bank v. Bradstreet*, 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. (N. S.) 747; *Johnson v. Clark*, 39 N. Y. 216; *First Nat. Bank v. Muskogee Pipe Line Co.*, 40 Okla. 603, 139 Pac. 1136, L. R. A. 1916 B. 1021. Cf. *Soppe v. Mecha-*

**Section 136.—[TIME ALLOWED DRAWEE ACCEPT.]** The drawee is allowed twenty-four hours after presentment, in which to decide whether or not to accept the bill; but the acceptance if given, dates from the day of presentation.

**Section 137.—[LIABILITY OF DRAWEE RETURNING OR DESTROYING BILL.]** Where a drawee to whom a bill is delivered for acceptance destroys the same or fuses within twenty-four hours after such delivery, or such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.<sup>92</sup>

The language of this section if taken literally seems open to objection. Aside from the inartistic terminology in calling what is really conversion an acceptance, it is to follow that if such conversion is deemed an acceptance, no notice of dishonor need not be given to the drawer or to the indorser, with an unfortunate result. Furthermore it is doubtful whether the words "within such other period" are intended to mean "within such longer period." Presumably they are so intended, but they do not say so. Accidental destruction is not within the scope of the section.<sup>93</sup> Retention without more does not amount to an acceptance within the meaning of the statutes from which this was taken;<sup>94</sup> but under the Negotiable Instruments Law it has been held that such retention does amount to an acceptance.<sup>95</sup>

*Levy (Neb.)*, 172 N. W. 35; *Bank of Morganton v. Hay*, 143 N. C. 326, 55 S. E. 811; *Colcord v. Banco de Tamapulipas*, 181 N. Y. App. D. 295, 168 N. Y. S. 710, where the writing did not amount to an acceptance. This section is held applicable to checks. *Selma Sav. Bank v. Webster County Sav. Bank (Ky.)*, 206 S. W. 870.

<sup>92</sup> This section is omitted in Illinois and South Dakota. In Pennsylvania and Wisconsin it is provided that mere retention is not an acceptance.

<sup>93</sup> *Bailey v. Southwestern Co.*, 126 Ark. 257, 190 S. W. 430, 207 S. W. 34.

<sup>94</sup> See *St. Louis & Co. Ry. Co. v. Marsh*, 57 Mo. App. 566; *v. Moulton*, 79 N. Y. 627.

<sup>95</sup> *State Bank v. Weiss*, 46 N. Y. S. 276; *Wisner v. Bank*, 220 Pa. 21, 68 Atl. 98; *A. (N. S.)* 1266 (changed in Pennsylvania; see *Union v. Franklin Nat. Bank*, 249 Atl. 1085); *People's Nat. Bank v. Swift*, 134 Tenn. 175, 183 S. E. 1074. See also *Standard Trust Commercial Nat. Bank*, 166 N. S. E. 1074.

**Section 138.—[ACCEPTANCE OF INCOMPLETE BILL.]** A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

**§ 1196. General and qualified acceptances.**

**Section 139.—[KINDS OF ACCEPTANCES.]** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

**Section 140.—[WHAT CONSTITUTES A GENERAL ACCEPTANCE.]** An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

**Section 141.—[QUALIFIED ACCEPTANCE.]** An acceptance is qualified, which is:—

(1) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

(2) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(3) Local, that is to say, an acceptance to pay only at a particular place;

(4) Qualified as to time;

(5) The acceptance of some one or more of the drawees, but not of all.

**Section 142.—[RIGHTS OF PARTIES AS TO QUALIFIED ACCEPTANCE.]** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the

holder to take a qualified acceptance, or subsequent thereto. When the drawer or an indorser receives of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed assented thereto.<sup>96</sup>

§ 1197. When presentment for acceptance is necessary

### ARTICLE III

#### PRESENTMENT FOR ACCEPTANCE

Section 143.—[WHEN PRESENTMENT FOR ACCEPTANCE MUST BE MADE.] Presentment for acceptance must be made:—

(1) Where the bill is payable after sight, or in any case, where presentment for acceptance is necessary to fix the maturity of the instrument; or

(2) Where the bill expressly stipulates that it is to be presented for acceptance; or

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Section 144.—[WHEN FAILURE TO PRESENT A BILL RELEASES DRAWER AND INDORSER.] Except as otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and indorsers are discharged.

§ 1198. How and when presentment for acceptance is to be made.

Section 145.—[PRESENTMENT; HOW MADE.] Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and

<sup>96</sup> See *Lewis, Hubbard & Co. v. Morton*, 80 W. Va. 137, 92 S. E.

the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

(1) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

(2) Where the drawee is dead, presentment may be made to his personal representative;

(3) Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Section 146.—[ON WHAT DAYS PRESENTMENT MAY BE MADE.] A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.<sup>97</sup>

Section 147.—[PRESENTMENT WHERE TIME IS INSUFFICIENT.] Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 1199. Dishonor by non-acceptance and its effect.

Section 148.—[WHERE PRESENTMENT IS EXCUSED.] Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:—

(1) Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

<sup>97</sup> The last sentence is omitted in Kentucky and Wisconsin.

**§ 1200 BILLS OF EXCHANGE AND PROMISSORY NOTE**

(2) Where, after the exercise of reasonable presentment cannot be made.

(3) Where, although presentment has been acceptance has been refused on some other ground

**Section 149.—[WHEN DISHONORED BY ACCEPTANCE.]** A bill is dishonored by non-acceptance

(1) When it is duly presented for acceptance an acceptance as is prescribed by this act is refused; or cannot be obtained; or

(2) When presentment for acceptance is excused and the bill is not accepted.

**Section 150.—[DUTY OF HOLDER WHERE BILL IS NOT ACCEPTED.]** Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the holder presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

**Section 151.—[RIGHTS OF HOLDER WHERE BILL IS NOT ACCEPTED.]** When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder and presentment for payment is necessary.

**§ 1200. Requirement of protest and its contents.**

**ARTICLE IV**

**PROTEST**

**Section 152.—[IN WHAT CASES PROTEST IS NECESSARY.]** Where a foreign bill appearing on its face such is dishonored by non-acceptance, it must be protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance or dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of non-acceptance is unnecessary.

**Section 153.—[PROTEST; HOW MADE.]** The protest must be annexed to the bill, or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify:—

- (1) The time and place of presentment;
- (2) The fact that presentment was made and the manner thereof;
- (3) The cause or reason for protesting the bill;
- (4) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 1201. By whom, when and where protest should be made.

**Section 154.—[PROTEST; BY WHOM MADE.]** Protest may be made by,—

- (1) A notary public; or
- (2) By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

**Section 155.—[PROTEST; WHEN TO BE MADE.]** When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

**Section 156.—[PROTEST; WHERE MADE.]** A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

**Section 157.—[PROTEST BOTH FOR NON-ACCEPTANCE AND NON-PAYMENT.]** A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

**Section 158.—[PROTEST BEFORE MATURITY WHERE ACCEPTOR INSOLVENT.]** Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures,

§ 1202 **BILLS OF EXCHANGE AND PROMISSORY NOTE.**  
the holder may cause the bill to be protested for  
security against the drawer and indorsers.

§ 1202. When protest excused; lost bill.

**Section 159.—[WHEN PROTEST DISPENSED WITH.]** Protest is dispensed with by any circumstances which  
dispense with notice of dishonor. Delay in noting or  
protesting is excused when delay is caused by circumstances  
under the control of the holder and not imputable to his  
misconduct or negligence. When the cause of delay  
operates, the bill must be noted or protested with reasonable  
diligence.

**Section 160.—[PROTEST WHERE BILL IS LOST.]** When a bill is lost or destroyed or is wrongfully detained by  
the person entitled to hold it, protest may be made on a  
copy or written particulars thereof.

§ 1203. Nature of acceptance for honor.

## **ARTICLE V**

### **ACCEPTANCE FOR HONOR**

**Section 161.—[WHEN BILL MAY BE ACCEPTED FOR HONOR.]** Where a bill of exchange has been protested for  
dishonor by non-acceptance or protested for better  
and is not overdue, any person not being a party already  
thereon may, with the consent of the holder, intervene  
and accept the bill supra protest for the honor of any party  
thereon, or for the honor of the person for whose account  
the bill is drawn. The acceptance for honor may be for  
only of the sum for which the bill is drawn; and where  
there has been an acceptance for honor for one party, there  
shall be no further acceptance by a different person for the  
honor of another party.

**Section 162.—[ACCEPTANCE FOR HONOR HOW MADE.]** An acceptance for honor supra protest  
shall be in writing, and indicate that it is an acceptance for honor  
and must be signed by the acceptor for honor.

**Section 163.—[WHEN DEEMED TO BE AN ACCEPTANCE FOR HONOR OF THE DRAWER.]** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 1204. Obligation incurred by acceptor for honor.

**Section 164.—[LIABILITY OF THE ACCEPTOR FOR HONOR.]** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

**Section 165.—[AGREEMENT OF ACCEPTOR FOR HONOR.]** The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him.

**Section 166.—[MATURITY OF BILL PAYABLE AFTER SIGHT; ACCEPTED FOR HONOR.]** Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 1205. Presentment and protest of acceptance for honor.

**Section 167.—[PROTEST OF BILL ACCEPTED FOR HONOR, ETC.]** Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

**Section 168.—[PRESENTMENT FOR PAYMENT TO ACCEPTOR FOR HONOR; HOW MADE.]** Presentment for payment to the acceptor for honor must be made as follows:—

(1) If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

(2) If it is to be presented in some other place than the

place where it was protested, then it must be within the time specified in section one hundred and

Section 169.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] The provisions of section one hundred and eighty apply where there is delay in making presentment exceptor for honor or referee in case of need.

Section 170.—[DISHONOR OF BILL BY ACCEPTOR FOR HONOR.] When the bill is dishonored by the acceptor for honor it must be protested for non-payment by

§ 1206. Payment for honor.

## ARTICLE VI

### PAYMENT FOR HONOR

Section 171.—[WHO MAY MAKE PAYMENT FOR HONOR.] Where a bill has been protested for non-payment any person may intervene and pay it supra protest for honor of any person liable thereon or for the honor of any person for whose account it was drawn.

Section 172.—[PAYMENT FOR HONOR; HOW MADE.] The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be made by a notarial act of honor which may be appended to the protest or form an extension to it.

Section 173.—[DECLARATION BEFORE PAYMENT FOR HONOR.] The notarial act of honor must be made on a declaration made by the payer for honor or by some other person in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Section 174.—[PREFERENCE OF PARTIES OF PAYERS.] Where two or more persons agree to pay a bill for the honor of different parties, the payment of whose payment will discharge most parties to the bill shall be given the preference.

Section 175.—[EFFECT ON SUBSEQUENT PAYMENT.] Where a bill has been paid for honor, all parties subsequent to the payment are discharged.

for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Section 176.—[WHERE HOLDER REFUSES TO RECEIVE PAYMENT SUPRA PROTEST.] Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Section 177.—[RIGHTS OF PAYER FOR HONOR.] The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

### § 1207. Bills in parts or sets.

## ARTICLE VII

### BILLS IN A SET

Section 178.—[BILLS IN SETS CONSTITUTE ONE BILL.] Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Nevertheless as the following section shows the holder of a single part may be the owner of the whole bill.<sup>28</sup>

Section 179.—[RIGHT OF HOLDERS WHERE DIFFERENT PARTS ARE NEGOTIATED.] Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Section 180.—[LIABILITY OF HOLDER WHO INDORSES TWO OR MORE PARTS OF A SET TO DIFFER-

<sup>28</sup> *Caras v. Thalmann*, 138 N. Y. App. D. 297, 123 N. Y. S. 97. See also *Casper v. Kuhne*, 159 N. Y. App. D. 389, 144 N. Y. S. 502.

**ENT PERSONS.]** Where the holder of a set indorses more parts to different persons he is liable on every part, and every indorser subsequent to him is liable on every part he has himself indorsed, as if such parts were bills.

**Section 181.—[ACCEPTANCE OF BILLS DRAWN IN SETS.]** The acceptance may be written on any part, but it must be written on one part only. If the drawer indorses more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every part as if it were a separate bill.<sup>90</sup>

**Section 182.—[PAYMENT BY ACCEPTOR OF BILLS DRAWN IN SETS.]** When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at the time is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

**Section 183.—[EFFECT OF DISCHARGING ONE PART OF A SET.]** Except as herein otherwise provided, when one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.<sup>1</sup>

§ 1208. Definition of a promissory note.

### TITLE III

## PROMISSORY NOTES AND CHECKS

### ARTICLE I

**Section 184.—[PROMISSORY NOTE DEFINED.]** A promissory note is a written, unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the order of the maker, it is not complete until indorsed by him.

<sup>90</sup> See *Holdsworth v. Hunter*, 10 B. & C. 449.

<sup>1</sup> See *Casper v. Kuhne*, 144 N. Y. App. D. 389, 393.

### § 1209. Checks.

**Section 185.—[CHECK DEFINED.]** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

There are important differences between the legal effect of a check and of an ordinary bill of exchange: (1) A check is a representation that the drawee has in his hands funds to meet the check.<sup>2</sup> (2) Laches in presentment discharges the drawer of a check only to the extent of his loss.<sup>3</sup> (3) The effect of certification of a check in discharging drawer and indorser under Section 188 has no analogy in the acceptance of ordinary bills of exchange. (4) The reasonable time for presenting a demand bill may be extended by negotiating the bill,<sup>4</sup> and though the same rule is applicable to checks so far as indorsers are concerned, the drawer's liability cannot be preserved<sup>5</sup> by negotiating the check, which must be presented in order to charge the drawer (if the drawee bank is in the same place where the check is drawn) on the day following delivery,<sup>6</sup> or (if the drawee bank is not in the place where the check is drawn) it must be sent forward for collection on the following day.<sup>7</sup>

**Section 186.—[WITHIN WHAT TIME A CHECK MUST BE PRESENTED.]** A check must be presented for payment within a reasonable time after its issue or the drawer will

<sup>2</sup> *In re Robinson*, 256 Fed. 55; *Barton v. People*, 135 Ill. 405, 25 N. E. 776; *Mulroney Mfg. Co. v. Weeks* (Iowa), 171 N. W. 36; *Foote v. People*, 17 Hun, 218.

<sup>3</sup> See Sec. 186 of the Act.

<sup>4</sup> See Sec. 71.

<sup>5</sup> *Plover Sav. Bank v. Moodie*, 135 Ia. 685, 110 N. W. 29, 113 N. W. 476; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

<sup>6</sup> *Dehoust v. Lewis*, 128 N. Y. App. Div. 131, 112 N. Y. S. 559, and see cases in the following note.

<sup>7</sup> *Watt v. Gans*, 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99; *Cox v. Citizens' State Bank*, 73 Kans. 789, 85 Pac. 762; *First Nat. Bank v. Buckhannon*, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; *Gordon v. Levine*, 194 Mass. 418, 421, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565; *Haggerty v. Baldwin*, 131 Mich. 187, 91 N. W. 150; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, L. R. A. 785; *Gregg v. Beane*, 69 Vt. 22, 26, 37 Atl. 248.

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**Section 188.—[EFFECT WHERE THE HOLDER OF CHECK PROCURES IT TO BE CERTIFIED.]** Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.<sup>13</sup>

If the drawer of a check procures it to be certified he is not discharged;<sup>14</sup> even though he does so at the payee's request.<sup>15</sup>

**Section 189.—[WHEN CHECK OPERATES AS AN ASSIGNMENT.]** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.<sup>16</sup>

## § 1210. Miscellaneous provisions.

### TITLE IV

### GENERAL PROVISIONS

### ARTICLE I

**Section 190.—[SHORT TITLE.]** This act may be cited as the Uniform Negotiable Instruments Act.<sup>17</sup>

First Nat. Bank, 213 N. Y. 301, 107 N. E. 693, L. R. A. 1916 C. 186; Meuer v. Phenix Nat. Bank, 94 N. Y. App. D. 331, 88 N. Y. S. 83; Blake v. Hamilton &c. Bank, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684.

<sup>13</sup> See Times Square Auto. Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 73 Atl. 479; St. Regis Paper Co. v. Tonawanda Co., 107 N. Y. App. D. 90, 94 N. Y. S. 946; Lyons v. Union Exch. Nat. Bank, 150 N. Y. App. D. 493, 135 N. Y. S. 121.

<sup>14</sup> Brunswick v. People's Sav. Bank, 194 Mo. App. 360, 190 S. W. 60; Cullinan v. Union Surety &c. Co., 79 N. Y. App. D. 409, 80 N. Y. S. 58;

Davenport v. Palmer, 152 N. Y. App. D. 761, 137 N. Y. S. 796.

<sup>15</sup> Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850.

<sup>16</sup> See *supra*, § 425.

<sup>17</sup> The Uniform Sales Act (Section 74), the Uniform Warehouse Receipts Act (Section 57), the Uniform Transfer of Stock Act (Section 19), and the Uniform Bills of Lading Act (Section 52), provide that: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." While the Uniform Negotiable Instruments Act does not contain this section, yet the courts have interpreted it in harmony with the

§ 1210 BILLS OF EXCHANGE AND PROMISSORY NOTE

**Section 191.—[DEFINITIONS AND MEANINGS.]** In this act, unless the context otherwise requires,

“Acceptance” means an acceptance complete by delivery or notification.

“Action” includes counterclaim and set-off.

“Bank” includes any person or association carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement complete by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” means print.

**Section 192.—[PERSON PRIMARILY LIABLE ON INSTRUMENT.]** The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other persons are “secondarily” liable.

**Section 193.—[REASONABLE TIME, WHAT CONSIDERED.]**

principle thus expressed. *Rockfield v. First Nat. Bank*, 77 Oh. St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Downey v. O’Keefe*, 26 R. I. 571, 59 Atl. 929; *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; *Gibbs v. Guaraglia*, 75

N. J. L. 168, 67 Atl. 81; *B. Kuntz*, 53 Fla. 340, 42 So. 2d 112; *quahar Co. v. Higham*, 161 N. W. 557; *Vander P. Zuuk*, 135 Ia. 350, 112 N. W. 275. L. R. A. (N. S.) 490, 124 A.

**TUTES.]** In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

**Section 194.—[TIME, HOW COMPUTED; WHEN LAST DAY FALLS ON HOLIDAY.]** Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

**Section 195.—[APPLICATION OF ACT.]** The provisions of this act do not apply to negotiable instruments made and delivered prior to the [taking effect] hereof.

**Section 196.—[CASES NOT PROVIDED FOR IN ACT.]** In any case not provided for in this act the rules of [law and equity including] the law merchant shall govern.<sup>18</sup>

**Section 197.—[REPEALS.]** All acts and parts of acts inconsistent with this act are hereby repealed.

**Section 198.—[TIME WHEN ACT TAKES EFFECT.]** This [act] shall take effect on <sup>19</sup>

<sup>18</sup> Section 196 as drafted reads "In any case not provided for in this Act the rules of the law merchant shall govern." The words in brackets [law and equity including] were inserted in many States to harmonise the section with the Uniform Sales Act (Section 73), the Uniform Warehouse Receipts Act (Section 56), the Uniform Transfer of Stock Act (Section 18) and the Uniform Bills of Lading Act (Section 51). The object of sections such as these, is to clearly point out that no one of these acts pretends to be a complete

codification of the whole law upon each topic but that there are cases not provided for in each of the statutes. Another purpose is to leave room for the growth of new usages and customs so that none of these acts should put the law merchant in a straight jacket and thus prevent the further expansion of the law merchant.

<sup>19</sup> Section 198 as drafted uses the word "chapter." In many States this term is inappropriate; therefore the word in brackets [Act] has been inserted in lieu of the word "chapter."

## CHAPTER XXXIV

### CONTRACTS OF SURETYSHIP. THE SURETY'S LIABILITY AND DEFENCES

<b>Suretyship defined</b> .....	
<b>Capacity to become surety</b> .....	
<b>The principal's non-liability as a defence to the surety</b> .....	
<b>The principal's non-liability as a defence to the surety's promise to fixed sum</b> .....	
<b>Discharge in bankruptcy of the principal debtor</b> .....	
<b>Discharge of the principal in bankruptcy may prevent performance of dition of the surety's liability</b> .....	
<b>Illegality of the contract with the principal as a defence to the surety</b> .....	
<b>Duress or fraud practiced on the principal</b> .....	
<b>Payment of the debt discharges the surety</b> .....	
<b>Release of the principal discharges the surety</b> .....	
<b>Whether an executory accord with the principal discharges the surety</b> .....	
<b>Giving time to the principal discharges the surety</b> .....	
<b>Surety's consent to extension of time</b> .....	
<b>Agreements with third persons to give time to the principal</b> .....	
<b>Reasons for discharge of surety when time has been given to principal</b> .....	
<b>Certainty of time for which extension is promised</b> .....	
<b>Extension of time for an illegal or usurious consideration</b> .....	
<b>Acceptance by the creditor of a confession of judgment at a future day by principal</b> .....	
<b>A promise to give time supported by an oral counter-promise within the ute of Frauds</b> .....	
<b>Reservation of rights against the surety</b> .....	
<b>Delay in enforcing the claim against the principal does not discharge surety</b> .....	
<b>Surrender of security by the creditor discharges the surety <i>pro tanto</i></b> .....	
<b>Impairment of security by creditor's negligent inaction</b> .....	
<b>Whether surrender of security of less value than the claim ever totally charges the surety</b> .....	
<b>Creditor's refusal of tender by the principal discharges the surety</b> ...	
<b>Creditor's failure to sue the principal when requested by a surety</b> ...	
<b>A surety is not entitled to notice of the principal's default</b> .....	
<b>Notice when required must be given within a reasonable time</b> .....	
<b>Variation or alteration of the contract between creditor and principal varies the surety's contract discharges him</b> .....	
<b>Variation of risk by change in the principal's contract</b> .....	
<b>A change in the terms of the contract between principal and creditor discharge the surety though not affecting the terms of his contract</b> .....	

A variation of the contract between creditor and principal impliedly authorized by the original contract between them will not discharge a surety . .	1242
The creditor's variation in the performance of his contract with the principal may discharge the surety . . . . .	1243
When non-compliance with a condition on which a contract is delivered by a surety relieves him from liability . . . . .	1244
Reasons for charging the surety . . . . .	1245
If the creditor is party to the fraud or has notice of it from the form of the instrument he cannot recover . . . . .	1246
Surety is bound by the principal's filling of blanks though in violation of instructions . . . . .	1247
Fraud or duress of the principal inducing the surety's promise will not excuse him . . . . .	1248
Failure of the creditor to disclose material facts at the time the surety's contract is made . . . . .	1249
Retention of a dishonest employee excuses from further liability a surety for his fidelity . . . . .	1250
The surety's right to set off a claim of the principal against the creditor . .	1251
Termination of surety's liability . . . . .	1252
Surety's right to revoke a continuing guaranty . . . . .	1253
It is immaterial that the surety's obligation has been reduced to judgment . . . . .	1254
Effect of prior judgment in favor of the principal on a subsequent action against the surety . . . . .	1255
Effect of prior judgment against the principal on a subsequent action against the surety . . . . .	1256
Equity will give relief against the surety in case of accident or mistake . . .	1257
Injurious action by the creditor will discharge a surety, though the creditor when the obligation was created was ignorant of the suretyship relation .	1258
At common law a party to a negotiable instrument apparently a principal but in fact a surety will be discharged by the creditor's inequitable conduct if the creditor knows of the true relation of the parties . . . . .	1259
Effect of the Negotiable Instruments Law . . . . .	1260
When accommodation parties on negotiable paper are co-sureties . . . . .	1261
Liability of accommodation indorsers on negotiable instruments is presumably successive . . . . .	1262
Release or inequitable dealing with one co-surety partially discharges others . . . . .	1263

### § 1211. Suretyship defined.

"Whoever is liable to pay the debt of another, whether for value, as in the case of the broker who receives a commission for incurring liability, or gratuitously as between himself and the person primarily liable, is a surety."<sup>1</sup> Whether one is a surety, therefore, depends not on his relation to the

<sup>1</sup> Per Jessel, M. R., in *Imperial Bank v. London, etc., Docks Co.*, 5 Ch. Div. 195, 200.

creditor but on his relation to the principal debtor. Frequently, an agreement for sufficient consideration between principal and surety, by which the latter assumes to answer the debt of the principal, transposes the surety into a principal and the principal into a surety.<sup>3</sup> In some American cases a narrower definition is given to the word surety. It is confined to one who makes a direct and unconditional promise to the creditor, distinguished from a guarantor who makes a collateral promise to pay the debt if the principal debtor fails to do so. In some American cases, also, a peculiar definition is given of the word which confines its meaning to an engagement that the principal debtor is solvent;<sup>5</sup> but there is no propriety in this usage or in ordinary legal usage in this restriction. The promise to pay if the principal debtor does not is the ordinary

<sup>3</sup> In *Dearing v. Veal*, 25 Ky. L. Rep. 1809, 78 S. W. 886, 887; *McGraw v. Union Trust Co.*, 136 Mich. 521, 99 N. W. 758; *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700, and *Reissaus v. Whites*, 128 Mo. App. 135, 106 S. W. 603, 605, the court defined a surety as any person "who, being liable to pay a debt, or perform an obligation is entitled if it is enforced against him, to be indemnified by some other person who ought himself to have made payment or performed before the surety was compelled to do so." See also the use of the word in *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *Thayer v. Braden*, 27 Cal. App. 435, 150 Pac. 653; *Townsend v. Sullivan*, 3 Cal. App. 115, 84 Pac. 435; *Singer Mfg. Co. v. Littler*, 58 Ia. 601, 9 N. W. 905; *Watriss v. Pierce*, 32 N. H. 560; *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Gagan v. Stevens*, 4 Utah, 348, 9 Pac. 706.

<sup>4</sup> *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358; *United States Bank v. Stewart*, 4 Dana, 27; *Williams v. Selly*, 37 N. Y. 375; *Rhea v. Preston*, 75 Va. 757; *Bailey v. Griffith*, 40 U. C. C. B. 418.

<sup>5</sup> *J. R. Watkins Medical Co. v. Lovelady*, 186 Ala. 414, 65 So. 52;

*W. T. Rawleigh Medical Supply Co. v. Pley*, 5 Ala. App. 412, 186 News-Times Pub. Co. v. Col. 386, 118 Pac. 974; *York & Heaney Mfg. Co.*, 184 I. N. E. 669 [*cf.* *Hess v. J. Medical Co.* (Ind. App.), 440]; *Courtis v. Dennis*, 173 Mi. N. W. 250, Ann. Cas. 16; *Rouse v. Wooten*, 140 N. S. E. 430, 432, 111 Am. S. Pittsburg Const. Co. v. Belt R. Co., 227 Pa. 90, 1029; *Homewood People's Bank v. Hastings*, 263 Pa. 260, 10 Farmers' & Merchants' N. Lillard Milling Co. (Tex. 210 S. W. 265; *Ballard v. Vt.* 387, 24 Atl. 769, 16 L. Ricketson v. Lizotte, 90 Atl. 801; *Kearnes v. Morris*, W. Va. 29.

<sup>6</sup> *McIntosh-Huntington*, 89 Fed. 464; *J. R. Watkins Medical Co. v. Lovelady*, 186 Ala. 414, 65 So. 52; *Manry v. Waxelbaum*, 17, 33 S. E. 701; *Northern v. Bellamy*, 19 N. Dak. 5, N. W. 888, 31 L. R. A. 1; *Reigart v. White*, 52 Pa. 41.

of a guaranty.<sup>6</sup> A promise to pay if the debtor is insolvent or cannot pay is a guarantee of collectibility.<sup>7</sup>

The question is simply one of terminology, but a confusion in terminology is likely to cause a confusion in the application of legal rules. The English terminology of calling any obligor a surety who is liable in any form for the debt of another not only is in inveterate common use in America also, but is intrinsically the better since it centres attention on the one vital point that the debt as between principal and surety is the debt of the principal. Most of the peculiar rules of suretyship in any form, whether of guaranty or otherwise, are based on this relation of the principal debtor to the surety and not on any difference between the form of contract which the surety makes with the creditor, and it is desirable to have a single word which includes all cases where the relation in question exists. The ordinary principles of contracts are generally sufficient to explain any differences in the creditor's right where the surety's undertaking is direct and where it is collateral. A surety may impose any condition in his promise to the creditor which the parties agree upon or the law implies, and there is no necessity for a single descriptive word for each of the various bargains that may be thus made. An indorser on commercial paper is a special kind of surety whose obligations are subject to conditions first implied in fact from the custom of merchants and now adopted into the law. Whether in a simple contract of guarantee the guarantor promises to pay (1), if the debtor fails to pay, or (2), if the creditor after due diligence is unable to collect, or (3) if the creditor is insolvent, or (4) on some other con-

<sup>6</sup> A guaranty is so defined, *e. g.*, in *Guaranty Trust Co. v. Koehler*, 187 Fed. 192, 200; *Pfaelzer v. Kau*, 207 Ill. 116, 69 N. E. 914, 916; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *J. L. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, 228; *Clymer v. Terry*, 50 Tex. Civ. App. 300, 109 S. W. 1129, 1131.

<sup>7</sup> Such phrases as "the surety insures the debt, the guarantor the solvency of

the debtor," and "A surety undertakes to pay if the debtor does not; a guarantor undertakes to pay if the debtor cannot" (see cases in the preceding note) are intended to express the narrow definition of guarantor here criticised. Even if the narrow definition of guarantor were accepted, the latter phrase is inaccurate since unquestionably a surety's promise is frequently subject to no condition whatever.

dition, is a question of fact. "In every case with reference to the terms of the guaranties and the circumstances which it was made to ascertain the character of the undertaking."<sup>8</sup>

### § 1212. Capacity to become surety.

Capacity to contract as a surety exists ordinarily where there is general capacity to contract. In a few States there have been introduced an exception in regard to the capacity of married women to become sureties, especially for bonds.<sup>9</sup> Capacity of an agent or partner to bind a principal or firm by a contract of suretyship must be governed by the general principles of agency and partnership. If neither actual nor apparent power exists, the principal or firm cannot be bound.<sup>10</sup> If the actual or apparent authority included such a contract and only a special or agreement restricted the power and made it improper, the test must be whether the creditor was without the impropriety when he received the surety's obligation. A corporation has power to enter into contracts of suretyship if the purpose of the contract is appropriate to the powers of the corporation.<sup>12</sup> Whether the cor-

<sup>8</sup> *Welsh v. Ebersole*, 75 Va. 651. Difficulty is often caused by statutory enactments in regard to "sureties," which the courts deem inappropriate to all kinds of suretyship contracts and therefore seek to narrow the meaning of the word.

<sup>9</sup> See *supra*, § 269. On the construction of such statutes, see *National Bank v. Smith*, 142 Ga. 663, 83 S. E. 526, L. R. A. 1915 B. 1116; *Druckmiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028; *Russell v. Rice*, 19 Ky. L. Rep. 1613, 44 S. W. 110.

<sup>10</sup> Cases of this sort concerning agents are *Dugan v. Champion, etc., Co.*, 105 Ky. 821, 49 S. W. 958; *Lovett v. Sullivan*, 189 Mass. 535, 75 N. E. 738; *Stovall v. Commonwealth*, 84 Va. 246, 4 S. E. 379. Cases concerning partners are—*Davis v. Black-*

*well*, 5 Ill. App. 32; *Russell v. Stone*, 109 Mass. 72, 12 Am. F. 300; *Stone v. Stone*, 30 Minn. N. W. 922, 923.

<sup>11</sup> In *Seufert v. Gille*, 131 S. W. 102, 31 L. R. A. 131, a partner after dissolution of the firm name to a renewal note originally due from the firm was held that if the payee was not the dissolution he could recover.

<sup>12</sup> *Heims Brewing Co. v. Nat. Bank*, 137 Ill. 309, 27 N. E. 28; *Nat. Bank v. Baker*, 170 Ill. 57, 57 N. E. 603; *Timm v. C. Brewery Co.*, 160 Mich. 357, 27 L. R. A. (N. S.) 357; *v. Hall*, 34 R. I. 273, 83 A. 113, 132 C. C. A. 357. Also *Re Romadka Bros.* (Ct. App. Ill.), 132 C. C. A. 357. *Brewing Co. v. Klassen*,

suretyship of a corporation entered into under other circumstances is wholly ineffectual, depends upon the law governing *ultra vires* contracts of corporations.<sup>13</sup>

Still another distinction must be taken. There are statutes prohibiting certain persons from becoming sureties on bonds of various kinds. These statutes are designed to secure a bond of unquestionable security not to protect the prohibited persons. Therefore though such statutes justify a refusal to accept a bond with sureties of the prohibited class, the sureties will, nevertheless, be held liable if the contract is actually entered into.<sup>14</sup>

### § 1213. The principal's non-liability as a defence to the surety.

It is often said that the surety is not liable unless the principal is bound, but that this rule is subject to many exceptions. Such a statement omits an essential primary inquiry, namely, what are the terms of the contract? It is possible for a surety to promise to pay whatever debt the principal may owe. On the other hand, the surety's promise may be to pay a stated sum or render a fixed performance for which the principal also purports to bind himself. If the contract is of the former sort it is obvious that by the very terms of his contract the surety is liable for nothing if the principal is under no liability;<sup>15</sup> and statements not infrequently made that a surety cannot be liable unless a principal debtor is liable have reference to such a case and must be confined to it. On a fair interpretation where the surety's promise relates to a specific transaction, it will generally be found that his promise must be construed as one to pay an agreed

57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362.

<sup>13</sup> See *supra*, § 271.

<sup>14</sup> King v. Sheriff, 2 East, 181, 182; Kansas v. United States, etc., Guaranty Co., 81 Kans. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; Holandsworth v. Commonwealth, 11 Bush, 617; Wal-

lace v. Scoles, 6 Ohio, 429; Kohn v. Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28. See also *infra*, § 1632.

<sup>15</sup> Bristol, etc., Co. v. Eveline, 89 Conn. 382, 94 Atl. 290; Marietta Fertilizer Co. v. Gary (Ga. App.), 96 S. E. 711; Galleher v. O'Grady, 78 N. H. 343, 100 Atl. 549. A similar question arises where the debts of another are assumed. See *supra*, § 394.

debtor has the defence of infancy,<sup>18</sup> insanity,<sup>19</sup> *ultra vires*;<sup>20</sup> or where there is any apparently valid but in fact defective obligation of the principal,<sup>21</sup> or such an alteration of a

N. C. 374, 375; Wiggins' App., 100 Pa. 155; Smyley v. Head, 2 Rich. L. 590, 45 Am. Dec. 750; Hicks v. Randolph, 3 Baxt. 352, 27 Am. Rep. 760; St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295; Kyger v. Sipe, 89 Va. 507, 16 S. E. 627; Bolyard v. Bolyard, 79 W. Va. 554 91 S. E. 529, L. R. A. 1917 D. 440.

<sup>18</sup> Wauthier v. Wilson, 27 T. L. R. 582, 28 T. L. R. 239; Baker v. Kennett, 54 Mo. 82; Gates v. Tebbetts, 83 Neb. 573, 119 N. W. 1120, 20 L. R. A. (N. S.) 1000; Kuns's Exr. v. Young, 34 Pa. 60; Kyger v. Sipe, 89 Va. 507, 16 S. E. 627; Burner v. Nutter, 77 W. Va. 256, 87 S. E. 359, 360. But where restoration of the consideration is made by law a condition of disaffirmance by the infant, and he has disaffirmed and put the other party in *statu quo*, the surety on a note given by the infant in the original transaction is discharged by failure of consideration. Keokuk State Bank v. Hall, 106 Ia. 540, 76 N. W. 832; Stanhope v. Shambow, 54 Mont. 360, 170 Pac. 752; Evans v. Taylor, 18 N. Mex. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113.

<sup>19</sup> Adler v. State, 35 Ark. 517, 37 Am. Rep. 48; Caldwell v. Ruddy, 2 Idaho, 5, 1 Pac. 339; Lee v. Yandell, 69 Tex. 34, 6 S. W. 665; Burner v. Nutter, 77 W. Va. 256, 87 S. E. 359; cf. Grove v. Johnston, L. R. 24 Ir. 352.

<sup>20</sup> Yorkshire Railway Wagon Co. v. Maclure, 19 Ch. D. 478; Chambers v. Manchester, etc., Ry. Co., 5 B. & S. 588, 612; Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102; Weare v. Sawyer, 44 N. H. 198; Davis v. Commissioners, 72 N. C. 441, 74 N. C. 374; Mason v. Nichols, 22 Wis. 376.

<sup>21</sup> Young v. Perry, 187 Ala. 122, 65 So. 817, 52 L. R. A. (N. S.) 1146; Helms v. Wayne Agricultural Co., 73

Ind. 325, 38 Am. Rep. 147 (forgery); Wayne Agricultural Co. v. Cardwell, 73 Ind. 555 (forgery); Jones v. Thayer, 12 Gray, 443, 74 Am. Dec. 602. In this case the principal debtor gave a note to his own order but failed to indorse it. Neither the creditor nor the surety knew this fact when the surety guaranteed payment of the note. Cf. however, Dole Bros. Co. v. Cosmopolitan Co., 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; Green v. Kindy, 43 Mich. 279, 5 N. W. 297, where the forgery of the principal's signature was held to excuse the surety; and Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665, where a majority of the court held that a surety for a partnership contract was not bound because the contract had been executed on behalf of the partnership by one partner without authority.

Wells, J., dissented and the dissent is supported by the following language of the court in Stewart v. Behm, 2 Watts, 356:—"Where the obligee has acted with good faith, what has he to do with the mistakes or misconceptions of the obligor? Here the principal obligor signed the name of his firm; and the point of defence is rested on an assumption of the fact that the surety supposed the signature would bind both the parties. But his mistake was in a matter of law which he was bound to know; and even had it been in a matter of fact, which was the basis of his motive for becoming bound, it would not avail him, unless it were induced by the misrepresentation of the obligee. Here it seems the obligee was not present at the act of execution; and as there is no pretence of misrepresentation or concealment by him at any time, there was no color for the defence." See also Watterson v.

written contract prior to its execution by the surety as discharges the principal.<sup>22</sup> Any of these defences of the principal might, however, be a defence to the surety if coupled with the further fact that the creditor at the time the surety's contract was entered into knew of the defence, and the surety did not know of it.<sup>23</sup>

### § 1215. Discharge in bankruptcy of the principal debtor.

In accordance with the principles stated in the previous section, the principal's discharge in bankruptcy does not excuse the surety from liability to the creditor.<sup>24</sup> This is expressly so provided in the Federal Bankruptcy Statute.<sup>25</sup> Even though the assent of a majority of his creditors is necessary in order to enable the principal to receive a discharge or to have a composition made effective and the creditor in question has joined in giving such assent, the surety has generally been held not to be released.<sup>26</sup> So far has this been

Owens River Canal Co., 25 Cal. App. 247, 143 Pac. 90; Luce v. Foster, 42 Neb. 818; Weare v. Sawyer, 44 N. H. 198, 205; Holland v. Clark, 67 N. Car. 104; Dickerman v. Bowman, 14 Wis. 388, and *infra*, §§ 1244 *et seq.*

<sup>22</sup> See *infra*, § 1898.

<sup>23</sup> See extract from Stewart v. Behm, 2 Watts, 356, *supra*, n. 21.

<sup>24</sup> *Ex parte* Williamson, 1 Atk. 82; Browne v. Carr, 7 Bing. 508; Moody v. King, 2 B. & C. 558; Inglis v. Macdougall, 1 Moore, 196; London Assurance Co. v. Buckle, 4 Moore, 153; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Knapp v. Anderson, 15 N. B. R. 316; Phillips v. Wade, 66 Ala. 53; Jones v. Hawkins, 60 Ga. 52; Lackey v. Steere, 121 Ill. 598, 13 N. E. 518, 2 Am. St. Rep. 135; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Burtis v. Wait, 33 Kans. 478, 6 Pac. 783; Serra v. Hoffman, 30 La. Ann. 67; Cochrane v. Cushing, 124 Mass. 219; Wolfboro Loan, etc., Co. v. Rollins, 195 Mass. 323, 81 N. E. 204; Robinson v. Soule, 56 Miss. 549; Claflin v. Cogan, 48 N. H. 411; Linn v. Hamilton, 34 N. J.

L. 305; Hall v. Fowler, 6 Hill, 630; Wilson v. Field, 27 Hun, 46; Bank v. Simpson, 90 N. C. 467; Noble v. Scofield, 44 Vt. 281. Similarly where the principal, a corporation, is dissolved and under the statute its liability and that of its contributories discharged, the surety remains liable. *In re* Fitz George, [1905] 1 K. B. 462.

<sup>25</sup> Sec. 16.

<sup>26</sup> Browne v. Carr, 7 Bing. 508; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Exch. 10; *Ex parte* Jacobs, L. R. 10 Ch. 211 (overruling Wilson v. Lloyd, L. R. 16 Eq. 60); Simpson v. Henning, L. R. 10 Q. B. 406; *Re* Burchell, 4 Fed. 406; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Neslor v. Grove (N. J. Eq.), 107 Atl. 281 (the court held the surety impliedly assented to the discharge); Mason & Hamlin Co. v. Bancroft, 1 Abb. N. C. 415; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926. But see *contra*, *Re* McDonald, 14 N. B. R. 477; Calloway v. Snapp, 78 Ky. 561; Unino Nat. Bank v. Grant, 48 La. Ann. 18, 18 So. 705. But where a creditor

carried that even where it was found as a fact that except for the plaintiff's assent the bankrupt would not have received a discharge, the surety has been held liable.<sup>27</sup> Except as this last result may be required by express language in a Bankruptcy Statute, it seems somewhat difficult to support and to reconcile with decisions holding that the voluntary participation by the creditor in a foreign bankruptcy, whereby the discharge of the principal becomes binding on the creditor, discharges the surety.<sup>28</sup>

**§ 1216. Discharge of the principal in bankruptcy may prevent performance of a condition of the surety's liability.**

Though the mere discharge in bankruptcy of the principal does not discharge the surety, it should be observed that the surety's obligation may be subject to an express condition which precludes enforcement of the debt against him after the discharge of the principal. Thus a bond given to discharge an attachment is generally conditioned on the payment of any judgment which may be recovered against the principal. If, therefore, no judgment can be recovered against the principal because he has been discharged, it necessarily follows that the surety escapes liability. To avoid this difficulty some courts have, without the aid of a procedural statute authorizing it, given judgment against the principal with a perpetual stay of execution,<sup>29</sup> thereby satis-

secretly bargained for a greater proportion of his claim than other creditors were to receive, this not only deprived him of all right against the debtor but also against a surety for the debtor, though the composition deed expressly reserved rights against sureties. *Mayhew v. Boyes*, 103 L. T. (N. S.) 1.

<sup>27</sup> *Cilley v. Colby*, 61 N. H. 63.

<sup>28</sup> *Third Nat. Bank v. Hastings*, 134 N. Y. 501, 505, 32 N. E. 71; *Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755.

<sup>29</sup> *Re Martin*, 105 Fed. 753; *Re Albrecht*, 17 N. B. R. 287; *Hill v. Harding*, 116 Ill. 92, 4 N. E. 361; *Kendrick v. Warren*, 110 Md. 47, 76, 72 Atl.

461, 465; *Fisse v. Einstein*, 5 Mo. App. 78; *Zollar v. Janvrin*, 49 N. H. 114, 6 Am. Rep. 469; *Batchelder v. Putnam*, 54 N. H. 84, 20 Am. Rep. 115; *Holyoke v. Adams*, 1 Hun, 223; *Farrell v. Finch*, 40 Ohio St. 337. Where, however, the attachment was made within four months the court refused to enter a judgment with stay of execution against the principal debtor in order to charge sureties on the attachment bond, in *House v. Schnadig*, 235 Ill. 301, 85 N. E. 395; *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376, (see also *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A.

fying the condition of the surety's obligation with more than technical violation to the principal's discharge; and the Supreme Court of the United States held that rendering such a judgment is not inconsistent with the protection given by the Bankruptcy Law to a discharged bankrupt.<sup>30</sup> Other States, however, have had to give such a qualified judgment against the principal in the absence of an express local statute authorizing it. Somewhat similar cases may arise in regard to directors and stockholders who are made liable by statute, under certain circumstances, sureties for the debts of the corporation. A State statute requires as a condition of the liability of a director that judgment shall first be obtained against the corporation and execution be returned unsatisfied. It is impossible to comply with this condition if the corporation obtains a discharge in bankruptcy.<sup>32</sup>

**§ 1217. Illegality of the contract with the principal when the discharge of the principal is a defence to the surety.**

The general reason for denying recovery in such cases (see § 1229); since under the Bankruptcy Statute such an attachment would have been dissolved by bankruptcy, and the court declined to give its aid to hold the surety on the bond bound to satisfy a judgment which could not have been satisfied from the attached property if no bond had been given to dissolve the attachment.

<sup>30</sup> *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1084.

<sup>31</sup> *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A. 229; *Odell v. Wootten*, 38 Ga. 224; *Payne v. Able*, 7 Bush, 344, 3 Am. Rep. 316; *Carpenter v. Turrell*, 100 Mass. 450; *Barnstable Savings Bank v. Higgins*, 124 Mass. 115; *Goyer Co. v. Jones*, 79 Miss. 253, 30 So. 651; *Martin v. Kilbourn* (Tenn.), 1 Cent. L. J. 94. In Massachusetts the Statute of 1875, Chap. 68, enabled judgment to be given against the sureties though the principal had been discharged in bankruptcy. See

*Fickett v. Durham*, 119 Barnstable Savings Bank 124 Mass. 115.

<sup>32</sup> In *Train v. Marshall*, 180 Mass. 513, 62 N. E. 9, the court held the discharge of the principal barred relief against the surety. Cf. *Way v. Barney*, 116 Mich. 1, 75 N. W. 801, 38 L. R. A. 101, 10 Ann. Cas. 1913 A. 719. In *Vanderveer*, 55 N. Y. App. Div. 67, 67 N. Y. S. 371. By the amendment to Sec. 4 (b) of the Federal Bankruptcy Act after the decision in *Train*, the court in *Paper Co.*, *supra*, it was pronounced that "The bankruptcy of a corporation shall not release its officers or stockholders, as such, from their liability under the laws of the Territory of the United States." It is difficult, however, to see how the Federal Bankruptcy Statute can change the conditions which the local law may impose qualifying the liability of directors and stockholders.

tracts is not so much the illegality of the contract as the illegality of the plaintiff.<sup>33</sup> A creditor, therefore, tainted with illegality in his contract with the principal of a kind which would prevent recovery against the latter is subject to the same defence when endeavoring to enforce the surety's obligation.<sup>34</sup> What illegality is of this sort and when it is so directly connected with a contract as to make it unenforceable is elsewhere considered.<sup>35</sup> Even though the illegality would not totally destroy the principal's liability, if it impairs in any way the surety's position, and was not known to him he will be discharged.<sup>35a</sup> It is, however, to be observed that where the non-enforcement of an illegal contract would impose a penalty on those intended to be protected by the law, the obligation will be enforced;<sup>35b</sup> and this principle finds illustration in official bonds, required for the security of those to whom the principal on the bond is or may be liable in his official capacity. Though such a bond may be taken in a form forbidden by law, not only the principal but the sureties will be liable.<sup>35c</sup>

<sup>33</sup> See *infra*, § 1630.

<sup>34</sup> *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66; *State v. Brantley*, 27 Ala. 44; *United States Fidelity & Co. v. Charles*, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212; *First Nat. Bank v. Clark's Est.*, 59 Colo. 455, 149 Pac. 612; *Ferry v. Burchard*, 21 Conn. 597; *William-Hester Marble Co. v. Walton* (Ga. App.), 96 S. E. 269; *Thompson v. Buckhannon*, 2 J. J. Marsh. 416, 419; *Leckie v. Scott*, 10 La. 412; *Gorham v. Keyes*, 137 Mass. 583; *Boylston Bottling Co. v. O'Neill*, 231 Mass. 498, 121 N. E. 411; *Crum v. Wilson*, 61 Miss. 233; *Harley v. Stapleton*, 24 Mo. 248; *Swift v. Beers*, 3 Denio, 70; *Morse v. Hovey*, 9 Paige, 197; *Basnight v. American Mfg. Co.*, 174 N. C. 206, 93 S. E. 734; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. Dec. 631; *Hartford Township Board v. Thompson*, 33 Ohio St. 321; *Zurn v. Mitchell* (Tex. Civ. App.), 196 S. W. 544. In *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199 S. W. 1025,

the obligation was held binding on the surety to the extent that the transaction was legal, though it was partially illegal.

<sup>35</sup> See *infra*, §§ 1628 *et seq.* In the following cases the illegal acts of the principal were held not so directly connected with the obligation in question as to give the surety a defence. *Tri-Bullion Smelting & Co. v. McLean*, 61 Colo. 80, 156 Pac. 133; *Eagle Roller Mill Co. v. Dillman*, 67 Minn. 232, 69 N. W. 910.

<sup>35a</sup> In *Lott v. Peterson* (Ga. App.), 98 S. E. 361, and *Duckett v. Martin* (Ga. App.), 99 S. E. 151, a surety on a note containing waiver of homestead exemption was held to be discharged by a secret usurious payment of interest which invalidated the waiver of exemption.

<sup>35b</sup> See *infra*, § 1632.

<sup>35c</sup> This was so held in regard to the bond of a bank cashier in *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199

of the surety's promise. For the same reason some cases deny the surety a defence because of fraud practiced on the principal.<sup>39</sup> In some of these cases, however, the facts were known to the surety when he entered into his obligation, and under such circumstances it is not inequitable to enforce his contract against him, if his promise was in either form.<sup>40</sup> It is obvious, however, that unless the surety has thus deprived himself of his equity, a result which permits the creditor to recover without first determining whether or not the principal wishes to exercise his privilege of avoiding the contract is open to the same objection as where the duress or fraud made the principal debtor's obligation absolutely void. Either the surety may be deprived of his right against the principal or the principal is in effect denied the right to avoid the transaction.<sup>40a</sup> The only problem is how to make sure that the principal's desire is to avoid the transaction before relieving the surety. To this end the surety should by some procedure be allowed to bring the facts before the court with all parties present. The appropriate method where common-law procedure is still in

*Spicer v. State*, 9 Ga. 49; *Plummer v. People*, 16 Ill. 358; *Peacock v. People*, 83 Ill. 331; *Tucker v. State*, 72 Ind. 242; *Jones v. Turner*, 5 Litt. 147; *Oak v. Dustin*, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281; *Robinson v. Gould*, 11 Cush. 55; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Harris v. Carmody*, 131 Mass. 51, 53, 41 Am. Rep. 188; *Thompson v. Lockwood*, 15 Johns. 256. See also *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725.

<sup>39</sup> *Fluker v. Henry's Adm.*, 27 Ala. 403; *Brown v. Wright*, 7 T. B. Mon. 396, 18 Am. Dec. 190; *Walker v. Gilbert*, 15 Miss. 456; *Ettlinger v. National Surety Co.*, 221 N. Y. 467, 117 N. E. 945.

<sup>40</sup> *Haney v. People*, 12 Colo. 345, 21 Pac. 39; *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725. In *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, the court held that knowledge by the surety of the fact of

imprisonment without knowledge of its illegality did not deprive the surety of a defence. See also *Osborn v. Robbins*, 36 N. Y. 365.

<sup>40a</sup> In *Patterson v. Gibson*, 81 Ga. 802, 806, 10 S. E. 9, 12 Am. St. Rep. 356, the court said: "In *Hawes et al. v. Marchant et al.*, 1 Curtis C. C. 136, Justice Curtis, in reviewing this doctrine as laid down in the leading case of *Hoscomb v. Standing*, says: 'It has often been assumed to be good law; I am not prepared to say it is not so, though it must be admitted that it may lead to strange consequences, in a case where the surety pays the bond and comes back on the principal to indemnify him, and thus the principal is effectually held for a debt which, according to the case in *Cro. Jac.*, does not appear to have been justly due, and which he was forced by duress to render himself liable for to the surety who at his request enters into the obligation.' "

force seems to be by a bill in equity in which the principal debtor are joined as defendants. The action at law against the sureties should, at the same time, be temporarily enjoined until it can be determined whether the principal has an effective defence against the creditor which he has not surrendered, and does not intend to surrender. If this is established the injunction against the creditor's proceeding should be made absolute.

The necessity of such procedure does not seem to have been much considered in the decisions,<sup>41</sup> but several courts have allowed the surety a defence because of duress or fraud on the principal without considering the possibility of ratification,<sup>42</sup> and the same result has been reached where the creditor has been guilty of fraud against the principal, or where there has been failure of consideration as to the principal, before judgment in the action against the surety the principal has manifested an election to avoid his agreement with the creditor should at once acquire an absolute defence at law for the principal's ratification has become the same as if the principal's agreement had been void *ab initio*.<sup>45</sup>

It has been assumed that the fraud or duress was exercised by the creditor. If exercised by a third person, the creditor has such a character as to render the obligation total, and the creditor who gives value for the obligation can enforce it not only against the surety, but against the defrauded principal. The case must also be distinguished where on the

<sup>41</sup> See *Walker v. Gilbert*, 15 Miss. 456.

<sup>42</sup> *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; *Schuster v. Arena*, 83 N. J. L. 79, 84 Atl. 723; *Griffith v. Sitgreaves*, 90 Pa. 161; *Bitner v. Diehl*, 61 Pa. Super. 483. See also *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913 D. 1185; *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725.

<sup>43</sup> *Whitcomb v. Shultz*, 223 Fed. 268, 278, 138 C. C. A. 510; *Hagar v. Mounts*, 3 Blackf. 57; *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767; *Putnam v. Schuyler*, 4 Hun, 166. See also *Schmidt v. Bank of Commerce*, 234 U. S.

64, 34 Sup. Ct. 730, 58 S. E. 359.

<sup>44</sup> *Troxler v. Wilson*, 202 S. W. 819; *Adams v. La. Ann.* 485; *Sawyer v. Barb.* 622; *Gunnis v. Pa.* 191, 6 Atl. 465; *cf. E. v. Robinson*, 1 Bailey (S. E.) 1.

<sup>45</sup> *Hazard v. Irwin*, 107 Pa. 45, 107 Atl. 675.

<sup>46</sup> See *infra*, §§ 1488, 16

<sup>47</sup> *Fairbanks v. Snow*, 13 N. E. 596, 1 Am. St. E. 13, also *infra*, §§ 1246, 1248.

of an obligation originally procured by the obligee by fraud or duress the surety guarantees its performance. If the obligation is non-negotiable the assignee cannot recover against the original obligor;<sup>48</sup> but the guarantor, whether himself innocent of the fraud or not, and whether or not he will have any remedy over against the principal is liable on his guaranty.<sup>49</sup>

### § 1219. Payment of the debt discharges the surety.

Whatever may be the form of a suretyship contract, the creditor is entitled to but a single full payment of his claim, and if he receives that, or a satisfaction accepted as equivalent the surety is discharged.<sup>50</sup> Even though the debt was paid by a third person, the result is the same.<sup>51</sup> If a third person wishes to keep the obligation of the surety alive, he should buy the claim from the creditor, not pay it. If once paid the debt cannot be revived by a subsequent assignment.<sup>52</sup> Where, however,

<sup>48</sup> See *supra*, § 432.

<sup>49</sup> *Mann v. Eckford's Exec.*, 15 Wend. 502; *Putnam v. Schuyler*, 4 Hun, 166.

<sup>50</sup> *Kinnaird v. Webster*, 10 Ch. D. 139; *Gartrell v. Johns*, 15 Ga. App. 671, 84 S. E. 175; *Lackey v. Steere*, 121 Ill. 598, 13 N. E. 518, 2 Am. St. Rep. 135; *Petefish v. Watkins*, 124 Ill. 384, 16 N. E. 248; *Knight v. Kerfoot*, (Ind. App. 1913), 102 N. E. 983; *Rubli v. Norman*, 7 Bush, 582; *Stewart v. Levis*, 42 La. Ann. 37, 6 So. 898; *Brink v. Bartlett*, 105 La. 336, 29 So. 958; *Burnet v. Courts*, 5 Har. & J. 78; *Baughner v. Duphorn*, 9 Gill, 314; *Merrimack Bank v. Parker*, 7 Pick. 88; *Chapman v. Collins*, 12 Cush. 163; *Coots v. Farnsworth*, 61 Mich. 497, 28 N. W. 534; *Walker v. Archer*, 128 Mich. 603, 87 N. W. 754; *Downs v. American Surety Co.*, 132 Minn. 201, 156 N. W. 5; *Foster v. Walker*, 34 Miss. 365; *Manufacturers' Union Co. v. Todd*, 4 Mo. App. 591; *Eastman v. Plumer*, 32 N. H. 238; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604;

*Woodman v. Mooring*, 3 Dev. 237; *Garrett v. Dodson* (Tex. Civ. App.), 199 S. W. 675; *Gibson v. Rix*, 32 Vt. 824; *Felch v. Lee*, 15 Wis. 265; *Greening v. Patten*, 51 Wis. 146, 8 N. W. 107; *cf. Bridgeton v. Fidelity & Co.*, 88 N. J. L. 645, 96 Atl. 918.

<sup>51</sup> *Blackburn v. Beall*, 21 Md. 208; *Eastman v. Plumer*, 32 N. H. 238. See *infra*, §§ 1857-1860.

<sup>52</sup> In *Gill v. Waterhouse*, 245 Fed. 75, 157 C. C. A. 371, discussing the question whether a guaranteed claim had been paid and the guarantor discharged the court said: "The most natural thing for men of business affairs to have done, if it were a purchase of the account, was to take an assignment of it at once, together with all the guaranties, and if it were not a purchase, simply to do as they did, pay the money, and let it be applied on the account, as was done. When, therefore, the money was paid, the account was satisfied to the extent of the payment, and a subsequent assignment by the bank could not re-

the payment is rightfully reclaimed, the rescission revives the liability of the surety.<sup>53</sup> Even reason for reclaiming the payment was because it was voidable by the debtor's assignee or trustee in bankruptcy, the creditor has been allowed to recover from the surety.<sup>54</sup>

### § 1220. Release of the principal discharges the surety

There are now to be considered certain equitable defences of the surety arising from dealings of the creditor with the principal. For such a defence to arise, it is necessary that the creditor should know of the suretyship relation. This knowledge may be disclosed by the contract itself, but frequently is not. It is generally immaterial, however, if the creditor knew of the relation when he took the action in question of the suretyship relation. If he derived this knowledge from the contract or from other sources.<sup>55</sup> A voluntary release of a known principal by the creditor or an accord and satisfaction of the principal discharges the surety, unless his liability is expressly reserved. And if there are several principals a release of a

principal does not discharge the surety for the others. *Bank v. Cooke*, 13 I. R. 6 Q. B. 790. If the account being satisfied, the guaranty was satisfied also, and Gill has his recourse only against McNab, at whose request he made the payment. The conclusion thus reached is borne out by the following analogous cases: *Lee v. Field*, 9 N. Mex. 435, 54 Pac. 873; *Penwell v. Flickinger*, 46 Mont. 526, 129 Pac. 323; *Moran v. Abbey*, 63 Cal. 56; *Day v. Humphrey*, 79 Ill. 452."

<sup>53</sup> *Petty v. Cooke*, L. R. 6 Q. B. 790.

<sup>54</sup> *Pritchard v. Hitchcock*, 6 M. & G. 151; *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 9, 54 C. C. A. 387; *Watson v. Poague*, 42 Ia. 582; *Perry v. Van Norden Trust Co.*, 103 N. Y. S. 543; *Wright v. Gansevoort Bank*, 103 N. Y. S. 548; *Harner v. Batdorf*, 35 Oh. St. 113; *Second Nat. Bank v. Prewett*, 117 Tenn. 1, 96 S. W. 334, 9 L. R. A. (N. S.) 581. But see *contra* *Northern*

*Bank v. Cooke*, 13 I. R. 6 Q. B. 790; *Northern Bank v. Farmer*, 111 Ky. 350, 63 S. W. 111; *Bartholow v. Bean*, 18 L. Ed. 866; *In re George*, 130 Fed. 315, 64 C. C. A. 130.

<sup>55</sup> See *infra*, §§ 1258-1260.

<sup>56</sup> *Lewis v. Jones*, 4 B. & C. 101; *v. Coe*, 77 Cal. 54, 18 Pa. St. Rep. 235; *State v. No. 1*, 1919), 106 Atl. 504; *v. Mattoon*, 5 Mackey, Ayer, 24 Ga. 288; *Am. Co. v. Lion, etc.*, Surety, 1304, 160 N. W. 939; *Penn.*, 22 La. Ann. 20; *Capel*, 53 Miss. 350; *Pr. Mo.* 241; *Kirby v. Ta.* Ch. 242; *Beaver Trust* Co. 259 Pa. 567, 103 Atl. 3; *Phillips*, 17 Tex. 128; *Thacher*, 48 Vt. 574; *Meighan*, 7 Ir. L. R. 519.

release the surety altogether.<sup>57</sup> But a release of part only of the claim will discharge the surety only to that extent.<sup>58</sup> If no fraud was practiced on the creditor, his ignorance when he accepted a compromise as full satisfaction from the principal of the existence of a surety will not prevent the latter's discharge.<sup>59</sup>

The original reason for the broad statement in the books that release of the principal discharged the surety is probably the assumption that the extinction of the debt of the principal necessarily extinguishes the surety's obligation; but here as always it is necessary to determine first what the surety promised. If he promised to be answerable for whatever the principal might owe, the fact that the principal now owes nothing is conclusive, but if the surety's promise was to pay a fixed sum of money or to perform a fixed act, the fact that a principal debtor was formerly bound for the same performance and has ceased to be so is not material. Another reason had to be found for the rule as applied to such a case and the statement has been made "that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor."<sup>60</sup> The validity of the reasoning depends upon the assumption that the creditor who releases the principal debtor thereby undertakes that the release shall be effectual to free the debtor from all possibility of indirect liability on the debt as well as from direct suit by the creditor. It may be questioned whether, in every case at least, this is a fair construction of the transaction even though no express language indicating a reservation of rights against the surety is used. A covenant not to sue one co-debtor where no suretyship relation exists, involves no obligation so to act that the covenantee shall not be sued for contribution by the other

<sup>57</sup> *Shutte v. Colgate Grain Co. Surety Co.*, 178 Ia. 1304, 160 N. W. (Okl.), 172 Pac. 780. 939.

<sup>58</sup> *Beaver Trust Co. v. Morgan*, 259 Pa. 567, 103 Atl. 367.

<sup>60</sup> *Mellish, L. J., in Nevill's Case*, L. R. 6 Ch. 43, 47.

<sup>59</sup> *American Blower Co. v. Lion, etc.*,

co-debtors,<sup>61</sup> and it is hard to see why the surety should affect the construction of a release or covenant to sue a co-debtor. If there is a valid reason then for the rule that a release of the principal discharges the surety, it must be because injury would be caused to the creditor by the contrary rule rather than to prevent bad faith to the principal. This is made abundantly clear by the fact that if the principal is fully indemnified against loss, he will not be discharged by a release of the principal,<sup>62</sup> and by the fact that if the discharge of the principal is due to the acts of the creditor which produce that result without any agreement on his part to the discharge, the surety is none the less relieved.<sup>63</sup> These cases also seem to indicate (though they are inconsistent with this) that the surety's loss of the benefit of subrogation by the creditor's action will not be a discharge unless loss of the right involved a real injury. The principle of the reasons why time given to the principal discharges the surety is here applicable.

**§ 1221. Whether an executory accord with the principal discharges the surety.**

An unexecuted agreement of accord for the settlement of the future day of the principal's debt, has been held to discharge the surety.<sup>64</sup> The reason given is that the accord does not suspend the right of action. If an accord is not a contract, this is true, and the authorities in question are less based on the old notion that an accord is invalid than on the fact that therefore merely illustrations of the principle that an accord to give time which is not binding does not affect the

<sup>61</sup> See *supra*, § 338.

<sup>62</sup> *Chilton v. Robbins*, 4 Ala. 223, 37 Am. Dec. 741; *Home Bank v. Waterman*, 134 Ill. 461, 29 N. E. 503; *Crim v. Fleming*, 101 Ind. 154; *Keinhaus v. Generous*, 25 Oh. St. 667; *Smith v. Steele's Estate*, 25 Vt. 427, 60 Am. Dec. 276; *Jones v. Ward*, 71 Wis. 152, 36 N. W. 711.

<sup>63</sup> *Mayhew v. Boyes*, 103 L. T. 1. (The creditor discharged the principal by secretly stipulating for a private

advantage over other creditors by composition.) *Beaver v. Morgan*, 259 Pa. 567, (The creditor discharged by misapplication of security.)

<sup>64</sup> *Badnall v. Samuel*, 1 M. & W. 1; *Vernon v. Turley*, 1 M. & W. 1; *Mueller v. Dobschuetz*, 72 Me. 346; *Harnsberger's* 1 Adm., 3 Gratt. 144.

<sup>65</sup> See *infra*, § 1839.

liability. But a bilateral accord supported by sufficient consideration is now recognized as a binding contract, and carries with it by implication an agreement on the part of the creditor to forbear until the time fixed in the accord for its performance; or if no time is fixed until a reasonable time for performance has elapsed.<sup>66</sup> Whether a remedy at law is allowed by local practice to a debtor whose creditor has agreed to forbear temporarily or whether the debtor's only remedy is a cross action for damages or an application to a court of equity for a temporary injunction, has not been thought material in the establishment of the general proposition that giving time to the principal discharges the surety,<sup>67</sup> and it should make no difference whether the creditor's sole undertaking is to forbear for a time or whether he agrees not only to forbear for a time but also then to accept some substituted performance in satisfaction of the obligation.

#### § 1222. Giving time to the principal discharges the surety.

Though it is a modern doctrine that a binding agreement between the principal and the creditor giving the former an extension of time for the payment or performance of his obligation discharges the surety,<sup>68</sup> and though the doctrine has been often criticized as going to an extreme in discharging the surety altogether even when the extension of time has injured him not at all, or very slightly,<sup>69</sup> no doctrine is better settled.<sup>70</sup>

<sup>66</sup> See *infra*, §§ 1844, 1845.

<sup>67</sup> See *Frazer v. Jordan*, 8 E. & B. 303.

<sup>68</sup> Professor Ames says (Cas. Suretyship, 156): "The doctrine that an agreement to give time to the principal discharges the surety in equity seems to be a comparatively modern notion. The editor has not discovered any earlier instances of the application of the doctrine than Lord Thurlow's decision in 1789, in the case of *Nisbet v. Smith*, 2 Bro. C. C. 579, which was followed by *Rees v. Berrington* (1795), 2 Ves. Jr. 540; *Boulton v. Stubbs* (1810), 18 Ves. 20; *Bowmaker v. Moore* (1816), 3 Price, 214; *Eyre v.*

*Bartrop* (1818), 3 Mad. 221. In all of the cases just cited the surety was a specialty obligor."

<sup>69</sup> See, *e. g.*, *per* Blackburn, J., in *Polak v. Everett*, 1 Q. B. D. 669.

<sup>70</sup> *Overend v. Oriental Financial Corp.*, L. R. 7 H. L. 348; *Clarke v. Birley*, 41 Ch. D. 422; *Bolton v. Salmon*, [1891], 2 Ch. 48; *Greenwood v. Francis* (1899), 1 Q. B. 312, 320; *Uniontown Bank v. Mackey*, 140 U. S. 220, 35 L. Ed. 485, 11 Sup. Ct. 844; *United States v. American Bonding & Trust Co.*, 89 Fed. 921, *aff'd* in 89 Fed. 925, 32 C. C. A. 420, 61 U. S. App. 584; *McMullen v. United States*, 167 Fed. 460, 93 C. C. A. 96; *Edwards*

Whether a particular agreement to give time is a tract, and therefore discharges the surety, only upon the terms of the creditor's promise, but the sufficiency of the consideration for it, if it is not. Since delay by the creditor in the enforcement does not discharge the surety,<sup>71</sup> and as an unenforced agreement to give time amounts merely to a revocable promise to defer performance, such an agreement does not

*v. Goode*, 228 Fed. 664, 143 C. C. A. 186; *Moses v. Home Bldg., etc., Assoc.*, 100 Ala. 465, 14 So. 412; *Kissire v. Plunkett-Jarrell Co.*, 103 Ark. 473, 145 S. W. 567; *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667; *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179; *Deming v. Norton, Kirby*, 397; *Clark v. Gerstley*, 26 Dist. Col. App. 205 (aff'd. 204 U. S. 504, 51 L. Ed. 589, 27 Sup. Ct. 337); *Bowen v. Darby*, 14 Fla. 202; *Randolph v. Fleming*, 59 Ga. 776; *Maydole v. Peterson*, 7 Idaho, 502, 63 Pac. 1048; *Skinner v. Sullivan*, 227 Ill. 93, 81 N. E. 11; *Lawrence v. Hammond*, 208 Ill. App. 31; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *State v. Adams (Ind.)*, 118 N. E. 60; *Diehl v. Davis*, 75 Kan. 38, 88 Pac. 532; *Farmers' Bank v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Staib v. German Ins. Bank*, 179 Ky. 118, 200 S. W. 322; *Alter v. Zunts*, 27 La. Ann. 317; *Dunn v. Spalding*, 43 Me. 336; *First Nat. Bank v. Blake*, 113 Me. 313, 93 Atl. 840; *Berman v. Elm, etc., Assoc.*, 114 Md. 191, 78 Atl. 1104; *Schwartz v. American Surety Co.*, 231 Mass. 490, 121 N. E. 424; *Walter A. Wood Co. v. Oliver*, 103 Mich. 326, 61 N. W. 507 (*cf.* *People v. Traves*, 188 Mich. 415, 154 N. W. 130); *Farmers' Supply Co. v. Weis*, 115 Minn. 428, 132 N. W. 917 (*cf.* *Standard Salt &c. Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802) *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Shuler v. Hummel*, 1 Neb. (Unoff.) 204, 95 N. W. 350; *Wright v. Bartlett*, 43 N. H. 548; *National Park Bank v. Koehler*,

204 N. Y. 174, 97 N. E. 174; *First Nat. Bank v. Sw*, 255, 39 S. E. 962; *McCaing Mach. Co. v. Rae*, N. W. 346; *Miller v. S*, 376; *Bennett v. Odnea*, 147 Pac. 1013; *Lazell*, Oreg. 549, 67 Pac. 1 Appeal, 108 Pa. 581; *S*, 41 S. C. 217, 19 S. E. 40; *v. Taylor*, 10 S. Dak. 450; *Foy v. Sinclair*, 93 S. W. 28; *Wylie v. High*, 306, 11 S. W. 1118; *Sp* (Tex. Civ. App.), 183 S. Slaughter Co. v. Eller (T 196 S. W. 704; *Scarbo* Kinson (Tex. Civ. App. 223; *Short v. Shannon* (T 211 S. W. 463; *New* Richards, 35 Vt. 281; *C* Mott Iron Works, 117 V 12; *Everett v. Snyder* Pac. 643; *Glenn v. Morg* 467; *Welch v. Kukuk*, 107 N. W. 301; *Lawren* Wyo. 414, 64 Pac. 339. *Traves*, 188 Mich. 345, 1 the court declined to ap ciple in favor of a su where no material inj caused, though admit uncompensated surety charged. See also *Gu* Pressed Brick Co., 191 L. Ed. 242, 24 S. Ct. United States &c. Co., 1 117 N. E. 894; *Young v* 228 Pa. 373, 77 Atl. 623  
<sup>71</sup> *Infra*, § 1231.

the surety.<sup>72</sup> For this reason where an agreement for time is obtained fraudulently by the debtor, the creditor has a right to rescind the agreement with the principal and still hold the surety.<sup>73</sup> The agreement from the outset has been voidable by the creditor, and should the surety at any time pay the debt, equally voidable by him. Clearly, also, where the contract is divisible and gives rise to a succession of debts giving time to the principal as to one will not discharge the surety's liability upon the others;<sup>74</sup> and probably this is true where time is given for part of an originally indivisible debt for which the surety was bound.<sup>75</sup> The surety's defence is equitable, and should only be available to the extent of his possible injury; but the rule tends to become formal and absolute and to be applied with little reference to such a limitation.

### § 1223. Surety's consent to extension of time.

If the surety assents to the extension of time either in his original contract or at any time before the extension is given, it seems clear, on the ground either of the terms of his contract or of waiver, that he will not be discharged;<sup>76</sup> and the surety's assent may be shown by parol though the contract extending the principal's time is in writing.<sup>77</sup> Moreover, one of the well-settled exceptional cases in which a promise without consideration to render a performance from which the promisor has al-

<sup>72</sup> *Harrell v. Kutz*, (Ga. App. 1918), 95 S. E. 717; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685, and see cases in the preceding note.

<sup>73</sup> *Hubbard v. Hart*, 71 Iowa, 668, 33 N. W. 233; *Bangs v. Strong*, 10 Paige, 11. See also *Scholefield v. Templer*, 4 D. G. & J. 429; *cf. Kirby v. Landis*, 54 Iowa, 150, 6 N. W. 173.

<sup>74</sup> *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46; *Coe v. Cassidy*, 72 N. Y. 133; *Provincial Bank v. Cussen*, L. R. 18 Ir. 382; *Commercial Bank v. Muirhead*, 12 U. C. Q. B. 39; *McLaughlin Carriage Co. v. Oland*, 34 Nova Scotia, 193.

<sup>75</sup> *Klein v. Long*, 27 N. Y. App. Div. 158, 50 N. Y. S. 419.

<sup>76</sup> *Mercantile Bank v. Taylor*, [1893] A. C. 317; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 48 L. Ed. 242, 24 S. Ct. 142; *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667; *State v. Adams*, (Ind. 1918), 118 N. E. 680; *Aldrich v. Rowell*, (Iowa, 1918), 166 N. W. 89; *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N. E. 982; *Barker v. United States &c. Co.*, 228 Mass. 421, 117 N. E. 894; *Chester v. Bank of Kingston*, 16 N. Y. 336.

<sup>77</sup> *Woodcock v. Oxford, etc., Ry.*, 1 Drew, 521; *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N. E. 982; *Osgood v. Miller*, 67 Me. 174; *Chester v. Bank of Kingston*, 16 N. Y. 336; *Dean v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847.

that it is a fraud on the principal after having given him time to enforce the obligation immediately against the surety who will then come back upon the principal.<sup>83</sup> This reasoning, however, is even more inadequate in regard to giving time than in regard to giving an absolute release. Here, as in the case of the release, the facts by no means always justify the construction of the creditor's agreement that neither directly or indirectly will the creditor do anything to compel the principal debtor to pay either himself or the surety the amount of the debt. But even if the facts did justify such a construction of the agreement, there is no reason why the surety should be totally discharged in order to save the principal

<sup>83</sup> Thus Lord Eldon said in *English v. Darley*, 2 Bos. & P. 61, "If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued."

In *Polak v. Everett*, 1 Q. B. D. 669, Blackburn, J., said: "It has been established for a very long time, beginning with *Rees v. Berrington*, 2 Ves. 540, to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor; and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell v. Howarth*, by Lord Eldon, is

because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: 'The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.' The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which is far too late to think about now. I must own I have had considerable doubts about the justice of that principle, but from the time of *Rees v. Berrington*, 2 Ves. 540, it has been undisputed law, and nothing but the legislature can interfere to alter it."

surety, if he chooses, may pay immediately and be subrogated to the creditor's right. But though a promise may be so vague or uncertain in regard to the time of performance that it is incapable of enforcement,<sup>86</sup> this will by no means always be true where no definite time is agreed upon. An agreement for sufficient consideration to forbear without specification of time will rarely if ever be held a nullity, so far as the principal debtor is concerned. Generally the agreement will be interpreted as requiring forbearance for a reasonable time.<sup>87</sup> If the agreement is binding in favor of the debtor it must be effectual to discharge the surety, unless the general principle that giving time to the principal discharges the surety is to be discarded. To say that a contract with the principal debtor to forbear for a day discharges the surety but that a contract to forbear for a reasonable time has no such operation, is absurd.<sup>88</sup>

#### § 1227. Extension of time for an illegal or usurious consideration.

Whether an agreement on the part of the creditor to give time is a binding contract and therefore a discharge of the surety, involves ordinarily merely an application of the principles governing the formation of contracts and these principles are sufficiently considered elsewhere. Illegality, however, may also be involved. The promise to extend time cannot well be illegal, but the consideration for it may be; and illegal consideration whether in the form of a promise or of an act will generally invalidate the promise for which

<sup>86</sup> See *supra*, § 38.

<sup>87</sup> *Supra*, § 136.

<sup>88</sup> In *Findley v. Hill*, 8 Or. 247, 34 Amer. Rep. 578, it was held that an agreement for consideration to forbear "until after harvest" would not discharge the surety, and a dictum to much the same effect is found in *Miller v. Stem*, 2 Pa. St. 286. But in *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621, an agreement made in summer to extend a note "until after threshing" was rightly held to discharge a surety and in *C. C. Slaughter Co. v. Eller* (Tex.

Civ. App.), 196 S. W. 704, an agreement to forbear until certain property could be sold was held to have the same effect. A case like *McGee v. Metcalf*, 12 Smedes & M. 535, 51 Am. Dec. 122, must be distinguished. There it was properly held that a direction to a sheriff "not to execute the execution until ordered to do so," would not discharge a surety for the reason that, "the time being indefinite, the stay could have been arrested at any time that the surety requested it to be done."

it was given.<sup>89</sup> But where usury is made illegal are not generally regarded as *in pari delicto*. The usury statutes differs in different States, and each should be considered; but generally if actual payment is made of usurious interest in order to secure an agreement, the creditor will be bound by his agreement, since it will not deprive the debtor of the promise for which the surety will, therefore, be discharged.<sup>90</sup>

But where the effect of usury statutes is to make payment a partial discharge of the principal, there has been held, since part payment of a liquidated debt is not sufficient consideration to support a promise; and the same result follows in a bilateral contract if the creditor's promise to pay usury is regarded as the cause of the illegality of the consideration.<sup>91</sup>

Where a negotiable note containing or including interest is given for the creditor's promise of extension, the surety has been held discharged in a few cases;<sup>92</sup> the same conclusion may be supported, where under the local law the note is not void, and if indorsed to a holder in due course it would be binding upon the debtor. But if the debtor makes an executory non-negotiable promise to pay the debt in return for the creditor's promise to give time, the

<sup>89</sup> See *infra*, § 1780.

<sup>90</sup> *Vary v. Norton*, 6 Fed. 808; *Kyle v. Bostick*, 10 Ala. 589; *Knight v. Hawkins*, 93 Ga. 709, 20 S. E. 266; *Myers v. First Nat. Bank*, 78 Ill. 257; *Beuton v. Dillon*, 63 Ill. App. 517, 521; *Lemmon v. Whitman*, 75 Ind. 318, 39 Am. Rep. 150; *Kenningham v. Bedford*, 1 B. Mon. 325; *Wild v. Howe*, 74 Mo. 551; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Billington v. Wagoner*, 33 N. Y. 31; *Scott v. Harris*, 76 N. C. 205 (but see *Bank v. Lineberger*, 83 N. C. 454); *Osborn v. Low*, 40 Ohio St. 347; *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111; *Turrill v. Boynton*, 23 Vt. 142; *Austin v. Dorwin*, 21 Vt. 38; *Parsons v. Harrold*, 46 W. Va. 122, 32

S. E. 1002; *Moulton v. Wis.* 169, 8 N. W. 621; *Parlin, etc., Co. v. Huts* 389, 65 N. E. 93.

<sup>91</sup> *Jenness v. Cutler*, 12 Polkinghorne v. Hendrick 366 (but see *Clayton v. Miss.* 499, 21 So. 565, 37 L. R. A. 771, 60 Am. S. 461; *Nightingale v. Meginnis*, 461; *Hartman v. Danner*, 461; *Calvert v. Good*, 95 Pa. 461; *Grayson's App.*, 108 Pa. 461; *well v. Holly*, 5 Rich. 47; *McNabb*, 97 Tenn. 236 1091.

<sup>92</sup> *Scott v. Saffold*, 37 Gr. 516; *Gillespie*, 12 Iowa, 55, 516; *Fay v. Tower*, 58 N. W. 558.

of usury by the debtor renders both promises unenforceable. The debtor can be protected by being freed from liability on his own promise, and the court will not go so far to aid him as to allow him to enforce the creditor's promise to give time, while denying the creditor any recovery on the debtor's promise. The surety is, therefore, not discharged.<sup>93</sup> And generally, the same principle has been applied where a note was given for the usurious interest.<sup>94</sup>

**§ 1228. Acceptance by the creditor of a confession of judgment at a future day by the principal.**

The acceptance by the creditor of an agreement for judgment at a future day against the principal has been held not to discharge the surety, where the agreement permitted the entry of judgment as soon or sooner than it could have been obtained by adversary proceedings against the debtor.<sup>95</sup> It is obvious, however, that if the date at which judgment may be entered under the agreement is sufficiently remote and the creditor is precluded by the agreement from seeking to get judgment at an earlier day, time is given to the principal and the surety should be discharged.

**§ 1229. A promise to give time supported by an oral counter promise within the Statute of Frauds.**

The severity of the rule that giving time to the principal

<sup>93</sup> *Cox v. Mobile &c. R.*, 37 Ala. 320; *Silmeyer v. Schaffer*, 60 Ill. 479; *Braman v. Howk*, 1 Blackf. 392; *Scott v. Hall*, 6 B. Mon. 285; *Berry v. Pullen*, 69 Me. 101; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Roberts v. Stewart*, 31 Miss. 664; *Fernan v. Doubleday*, 3 Lans. 216; *Thayer v. King*, 31 Hun, 437; *Payne v. Powell*, 14 Tex. 600; *Burgess v. Dewey*, 33 Vt. 618; *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572. See, however, *contra*—*Parmelee v. Williams*, 72 Ga. 42; *Wright v. Bartlett*, 43 N. H. 548, 551; *Draper v. Trescott*, 29 Barb. 401, 407.

<sup>94</sup> *Gilder v. Jeter*, 11 Ala. 256; *Anderson v. Mannon*, 7 B. Mon. 217;

*Duncan v. Reed*, 8 B. Mon. 382; *Roberts v. Stewart*, 31 Miss. 664; *Wilson v. Langford*, 5 Humph. 320; *Smith v. Woodbury*, 36 Vt. 303.

<sup>95</sup> *Price v. Edmunds*, 10 B. & C. 578; *Hulme v. Coles*, 2 Sim. 12; *Suydam v. Vance*, 2 McL. 99; *Fletcher v. Gamble*, 3 Ala. 335; *Barker v. M'Clure*, 2 Blackf. 14; *Gardner v. VanNorstrand*, 13 Wis. 543. An agreement to stay proceedings temporarily in an action against the principal was held not to discharge the surety in *Board of Comm'rs v. Clemens* (W. Va.), 100 S. E. 680. See also *Omaha Grain Exch. v. National Surety Co.* (Neb.), 174 N. W. 426.

seem inconsistent with the general rule that releasing or giving time to the surety discharges the principal; or, if not, to involve a very strained construction of language. If reasonably construed, the agreement between the creditor and the principal debtor affects and varies the surety's risk. If this is so, it is obvious that the agreement of the creditor and principal debtor with one another that they will increase the surety's risk and that the creditor shall nevertheless hold him liable, should have no effect.

The common reasoning to support the rule is that the reservation is effectual "upon this principle—first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him."<sup>1</sup>

It is conceded in the cases that the reservation of rights against the surety can only be valid on the assumption that the rights of the surety also are reserved.<sup>2</sup> It is often assumed that this involves merely the preservation to the surety of his right to enforce any direct obligation of indemnity running to him from the principal, but it must also involve the preservation of the right to enforce by way of subrogation the creditor's claim against the principal. It is sometimes asserted that this is equivalent to saying that the agreement between creditor and principal is conditional on the assent of the surety and that since he may if he chooses pay the creditor and enforce the claim against the principal, he is not discharged.<sup>3</sup>

*Prout v. Branch Bank*, 6 Ala. 309; *Dean v. Rice*, 63 Kans. 691, 66 Pac. 992; *Sohier v. Loring*, 6 Cush. 537; *Hunt v. Knox*, 34 Miss. 655; *National Park Bank v. Koehler*, 65 N. Y. Misc. 390, 121 N. Y. S. 640, *affd.* 137 N. Y. App. Div. 785, 122 N. Y. S. 490; *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583; *Kaufmann v. Rowan*, 189

Pa. 121, 42 Atl. 25; *Viele v. Hoag*, 24 Vt. 46; *Exchange Bldg. Co. v. Bayless*, 91 Va. 134, 21 S. E. 279; *Trust, etc., Co. v. McKenzie*, 23 Ont. App. 167.

<sup>1</sup> Parke, B., in *Kearsley v. Cole*, 16 M. & W. 128, 135.

<sup>2</sup> See cases in preceding notes.

<sup>3</sup> See for example *National Park Bank v. Koehler*, 65 N. Y. Misc. 390,

It is doubtless true that an agreement giving time that the surety assents thereto does not discharge and ought not to do so.<sup>5</sup> But it can only be said a reservation of rights as equivalent to this that if a reasonable person in the position of the debtor could infer from a reservation of rights against the surety on being compelled to pay would have the same over against himself to which their relation gave rise could hardly infer that the creditor's right against the principal also be kept alive for the benefit of the surety. It is not admissible to show that a release or receipt in written contract with the principal releasing him, at the time was subject to a reservation of rights against

392, 121 N. Y. S. 640; *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583.

<sup>4</sup> *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Kuhlman v. Leavens*, 5 Okl. 562, 50 Pac. 171; *Hamilton Nat. Bank v. Cook*, 130 Tenn. 465, 171 S. W. 86, L. R. A. 1915 C. 831.

<sup>5</sup> In *Prout v. Branch Bank*, 6 Ala. 309, the creditor reserved the right to bring action against the principal in case the surety so requested. This reservation, it was held, preserved the creditor's right against the surety.

<sup>6</sup> In *Spies v. National City Bank*, 68 N. Y. App. Div. 70, 74, 74 N. Y. S. 64 (affd. 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193), *Ingraham, J.*, said: "I know of no case, however, where the release itself was absolute upon its face, without any reservation against the other parties liable, that the creditor has been allowed to prove [such] an oral understanding, made contemporaneously with or prior to the execution of the release reserving his right to enforce the obligation as against the other parties liable thereon, as is sufficient to destroy the effect of the release of the principal, so far as it discharges the sureties."

In *Ex parte Glendenning*, 1 Buck, 517, Lord Eldon said: "The reservation must be upon the face of the

instrument by which the compromise; for it cannot be admitted to vary the effect of the instrument." *Overend v. Oriental Fire Ins. Co.*, L. R. 7 H. L. 348; *Meigs v. Taylor*, [1893] A. C. 517; *Ayer*, 24 Ga. 288; *Clark v. Boardman*, 185 Ill. 227, 56 N. E. 100; *Spaulding*, 145 Mass. 534, 1 Am. St. 475; *Callahan v. N. Y. Nat. Bk.*, 29 Am. Rep. 534; *Steindler*, 1 N. Y. Misc. S. 839; *Gorman v. Ives*, 1 Sup. Ct. 87. In *Brown v. Ga.*, 288, 295, the creditor gave half his claim from the principal gave a receipt stating that he received from the principal half of half his claim in full. The creditor testified that at the time of the agreement he remarked "proceed to make the release of Bates (the surety) if he could," and that this was an agreement between himself and the principal. This testimony seems not disputed, but the release of the principal was held to discharge the surety. But see *contra*, *Bailey v. Mfg. Co.*, 86 Miss. 63; *Massey v. Brown*, 4 S. C. 126, *infra*, § 1263, n. 44.

But if the evidence is clear of a parol agreement with the released debtor providing that the creditor's remedies against the other debtors should be reserved, a bill in equity to reform the written release should be sustained.<sup>7</sup> And when a settlement has been made by with the principal, it may be shown by parol that it was made subject to a reservation of rights against the surety.<sup>8</sup> The creditor cannot by virtue of a reservation of rights against the surety deprive him of any substantial right. Therefore, where a creditor who had judgment against the principal assigned the judgment, to a third person, as a partial payment of the latter's claim, a reservation of rights against the surety was held ineffectual, since the surety could not by paying the debt obtain control of the judgment against the principal.<sup>9</sup>

**§ 1231. Delay in enforcing the claim against the principal does not discharge the surety.**

However negligent the creditor may be in enforcing his claim against the principal debtor, this fact alone will not discharge the surety for "he might have paid the debt according to his undertaking and have sued the principal himself; or he might have gone into a court of equity after the debt became due and obtained a decree that the principal should pay it."<sup>10</sup>

Accordingly, even though the creditor loses altogether his right against the principal, because of the Statute of Limitations, or because of the statute requiring prompt presentment of claims against the estate of a deceased person, or of a bankrupt, the surety is not discharged.<sup>11</sup> It is, of course,

<sup>7</sup> *Bank of Montreal v. McFaul*, 17 Grant. Ch. (U. C.) 234.

<sup>8</sup> *Wyke v. Rogers*, 1 De G. McN. & G. 408; *Palmer v. Purdy*, 83 N. Y. 144. See also *Miller v. Beck*, 108 Ia. 575, 79 N. W. 344; *Louisville &c. Mail Co. v. Barnes*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. 273; *McCrillis v. Hawes*, 38 Me. 566. These decisions last cited related to liability in tort but the principle seems general.

<sup>9</sup> *Spies v. National City Bank*, 68 N. Y. App. Div. 70, 74 N. Y. S. 64, *affd.* 174 N. Y. 222, 66 N. E. 736.

<sup>10</sup> *Villars v. Palmer*, 67 Ill. 204. See also, *e. g.*, *State v. Northrop*, (Conn. 1919), 106 Atl. 504; *Lewis v. Blume*, 226 Mass. 505, 116 N. E. 271, and cases in the following note.

<sup>11</sup> *Carter v. White*, 25 Ch. Div. 666, 672, per Lindley, L. J.; *Minter v. Mobile Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 So. 881; *Sichel v. Carrillo*, 42 Cal. 500; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808; *Los Angeles County v. Lankershim*, 100 Cal. 525, 35 Pac. 153; *Villars v. Palmer*, 67 Ill.

possible to guarantee merely the collectibility and under such a guaranty a contrary conclusion reached;<sup>12</sup> and by statute the creditor may be exercise diligence in endeavoring to collect his claim from the principal.<sup>13</sup>

**§ 1232. Surrender of security by the creditor discharges the surety pro tanto.**

The obvious prejudice to a surety from the surrender of the security held by him has established that such a surrender discharges the surety to the extent of the value of the security surrendered.<sup>14</sup> There

204. See also *James v. Plank*, 159 Ill. App. 293; *Banks v. State*, 62 Md. 88; *Cohea v. Commissioners*, 15 Miss. 437; *Sibley v. McAllaster*, 8 N. H. 389; *Pfeiffer v. Crossley*, 91 N. J. L. 433, 103 Atl. 1000; *Moore v. Gray*, 26 Oh. St. 525; *Nashville Bank v. Campbell*, 7 Yerg. 353; *Marshall v. Hudson*, 9 Yerg. 57; *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460. But see *contra* *Auchampaugh, Admr., v. Schmidt*, 70 Iowa, 642, 27 N. W. 805; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833; *Stull v. Davidson*, 12 Bush, 167; *contra* *Siebert v. Quesnel*, 65 Minn. 107, 67 N. W. 803. It was suggested in *Auchampaugh v. Schmidt*, 70 Ia. 642 (27 N. W. 805), that "a surety paying a debt after it had become barred as against the principal, would be remediless," but see the contrary decisions of *Hooks v. Branch Bank*, 8 Ala. 580; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Marshall v. Hudson*, 9 Yerg. 57. See also *Cohea v. Commissioners*, 15 Miss. 437.

<sup>12</sup> See this distinction referred to in *Pfeiffer v. Crossley*, 91 N. J. L. 433, 103 Atl. 1000, and cases there cited.

<sup>13</sup> See *infra*, § 1236.

<sup>14</sup> *Pearl v. Deacon*, 24 Beav. 186, 3 Juris. N. S. 879; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557; *Hen-*

*derson v. Huey*, 45 Ala. 122; *v. Pace*, 34 Ark. 80; *State v. Pace*, 59 Ga. 701; *Kirkpatrick v. State*, 111 Ill. 122; *Weik v. Pugh*, 111 Ill. 122; *Bank of Monroe v. Gilman*, 300, 44 N. W. 558; *Union v. Cooley*, 27 La. Ann. 202; *Little*, 45 Me. 183; *Baker v. Pick*, 122, 19 Am. Dec. 3; *Sav. Bank v. Hayes*, 188 N. E. 311; *Durfee v. Keane*, 571, 117 N. E. 907; *Wilcox v. Minn.*, 17; *Long v. Mason*, 200 S. W. 1062; *Lake v. Missouri Trust Co.*, 147 S. W. 126 S. W. 547; *New Hampshire v. Colcord*, 15 N. H. 119, 685; *Monroe v. DeForest*, 264, 31 Atl. 773; *Bixby v. Hun*, 275; *Guilford Lum. Co. v. Holladay* (N. C.), 101; *Brown v. Rathburn*, 10 Or. 1; *v. Derby Coal Co.*, 98 Pa. 1; *Trust Co. v. Morgan*, 259 Atl. 367; *Otis v. Von Storch*, 41, 23 Atl. 39; *Cator v. B. & O.*, 408; *Scott v. Llano Court*, Tex. 221, 89 S. W. 749; *Dutton*, 57 Vt. 515; *Loop v. 3 Rand.*, 511; *Parsons v. H. & Va.*, 122, 32 S. E. 1002; *P. Gorman*, 93 Wis. 560, 67. If the creditor has security to the surety, he cannot re-

a creditor has obtained a lien by attachment, judgment or execution against the principal's property, a surrender of this lien reduces the principal's claim against the surety to the extent of the value of the lien.<sup>15</sup> For the same reason a mortgagee who releases a portion of the mortgaged premises to a grantee of the mortgagor, without the mortgagor's consent, must account for the value of the released premises in any action against the mortgagor for a deficiency after foreclosure.<sup>16</sup> And where the creditor was a seller of goods to the principal and had an agreement with him that the

surrendering that belonging to the principal. *Hill v. Horskins*, 150 Fed. 236.

<sup>15</sup> *Mayhew v. Crickett*, 2 Swanst. 185; s. c. Wils. Ch. 418; *Winston v. Yeargin*, 50 Ala. 340; *Mulford v. Estudillo*, 23 Cal. 94; *Thomas v. Wason*, 8 Col. App. 452, 46 Pac. 1079; *Houston v. Hurley*, 2 Del. Ch. 247; *Rawson v. Gregory*, 59 Ga. 733; *Brinton v. Gerry*, 7 Ill. App. 238; *Sterne v. Vincennes Bank*, 79 Ind. 549; *Green v. Blunt*, 59 Iowa, 79, 12 N. W. 762; *Mount Sterling Inf. Co. v. Cockrell*, 24 Ky. L. Rep. 1151, 70 S. W. 842; *Darland v. First Nat. Bank*, 177 Ky. 261, 197 S. W. 826; *Comstock v. Créon*, 1 Rob. La. 528; *Chipman v. Todd*, 60 Me. 282, 284; *Moss v. Pettingill*, 3 Minn. 217; *Brown v. Kidd*, 34 Miss. 291; *Priest v. Watson*, 75 Mo. 310, 42 Am. Rep. 409; *Bronson v. McCormick Co.*, 52 Neb. 342, 72 N. W. 312; *Nelson v. Williams*, 2 Dev. & B. Eq. 118; *Smith v. McLeod*, 3 Ired. Eq. 390; *Day v. Ramey*, 40 Oh. St. 446; *Templeton v. Shapley*, 107 Pa. 370; *Hutton v. Campbell*, 10 Lea, 170; *Watson v. Read*, 1 Tenn. Ch. 196; *Jenkins v. McNeese*, 34 Tex. 189; *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601; *Shannon v. McMullin*, 25 Gratt. 211; *Hyde v. Rogers*, 59 Wis. 154, 17 N. W. 127; *Spencer v. Thompson*, 6 Ir. C. L. R. 537. But in a few States the surrender of an attachment does not affect the creditor's claim against the surety.

*Glazier v. Douglass*, 32 Conn. 393, 400; *Barney v. Clark*, 46 N. H. 514; *Morrison v. Citizens' Bank*, 65 N. H. 253, 280, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39; *Montpelier Bank v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640; *Baker v. Marshall*, 16 Vt. 522, 42 Am. Dec. 528. See also *Page v. Webster*, 15 Me. 249, 33 Am. Dec. 608; *Lawson v. Snyder*, 1 Md. 71; *Bellows v. Lovell*, 4 Pick. 153, 5 Pick. 307; *Curtice v. Bothamly*, 8 Allen, 336. Where a creditor who had obtained an attachment joined in a petition in bankruptcy, upon which adjudication followed, dissolving the attachment, the surety was held not discharged. *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 476.

<sup>16</sup> *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. 108; *Townsend Sav. Bank v. Munson*, 47 Conn. 390; *Worcester Sav. Bank v. Thayer*, 136 Mass. 459; *Meigs v. Tunnicliffe*, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. 769. In *In re Hunter's Est.*, 257 Pa. 32, 101 Atl. 79, the court stated that "By such release the mortgagee assumes the risk of the unreleased portion of the property being of sufficient value to secure his debt." This would imply that the mortgagor was absolutely discharged in any event and not merely to the extent of his injury. Probably the case did not make the distinction important and it was not present in the mind of the court.

amount of certain discounts to which the principal should be applied to the claim, but it was agreed between them that the amount of the discounts be credited on other claims, the surety when the principal is entitled to the credit of the discounts. who has paid the debt before learning of the creditor of security may recover the amount which he surrendered. The impairment of security by the creditor through or negligent acts (not by mere inaction) has the effect of releasing the surety as surrender.<sup>19</sup>

The failure to realize upon a sale the full value of the security through fraudulent or negligent misconduct is a common illustration of the principle.<sup>20</sup> As the surety's defence is the injury which he suffers, he cannot complain if the creditor received a full equivalent in return for the security which he surrendered;<sup>21</sup> nor if the

<sup>17</sup> *Ballantine v. Fenn*, 88 Vt. 166, 92 Atl. 3. So where the seller waived a lien for which his contract provided. *Watson-Christensen Lumber Co. v. Maund* (Tex. Civ. App.), 199 S. W. 894.

<sup>18</sup> *Chester v. Kingston Bank*, 17 Barb. 271; *Dixon v. Ewing*, 3 Ohio, 280, 17 Am. Dec. 590.

<sup>19</sup> *Wulff v. Jay*, L. R. 7 Q. B. 756; *Allen v. O'Donald*, 23 Fed. 573; *Evans v. Kister*, 92 Fed. 828, 35 C. C. A. 28; *Dibert v. Wernicke*, 214 Fed. 673, 131 C. C. A. 109; *Griffeth v. Moss*, 94 Ga. 199, 21 S. E. 463; *State Bank v. Bryan*, 268 Ill. 151, 108 N. E. 1004; *Pfirshing v. Peterson*, 98 Ill. App. 70; *Robeson v. Roberts*, 20 Ind. 155, 83 Am. Dec. 308; *Magney v. Roberts*, 129 Ia. 218, 105 N. W. 430; *New England Mut. Life Ins. Co. v. Randall*, 42 La. Ann. 260, 7 So. 679; *Interstate Trust, etc., Co. v. Young*, 135 La. 465, 65 So. 611; *McMullen v. Hinkle*, 39 Miss. 142; *Holliday v. Brown*, 33 Neb. 657, 50 N. W. 1042; *Bank v. Young*, 43 N. H. 457; *Hutchinson v. Woodwell*, 107 Pa. 509; *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601; *Simpson*

*Logging Co. v. Northwest*, 76 Wash. 533, 137 Pac.

<sup>20</sup> *Mutual Loan Fund v. Low*, 5 C. B. (N. S.) 100, 131 (sale of security, where the debt was realized); *113 Ala. 608*, 21 So. 92 (sale of security by creditor); *100 Cal. 182*, 34 P. 34 (sale of security at private sale for its value); *Ward v. McElroy*, 811, 45 S. E. 688 (irregular sale whereby principal's security not sold for its actual value); *v. Burch*, 128 Ind. 324, 12 Ind. 324 (sale of security to creditor giving surety notice of sale).

<sup>21</sup> *North Av. Sav. Bk. v. Cleveland*, 33 Mo. 188, 188 Mass. 135, 74 N. E. 100; *Co. v. Hixon*, 69 Mo. 100, 36 N. Y. App. 100, 821; *Smith v. Bank*, 82 Tex. 368, 17 S. W. 2d 100; see *New Hampshire Bank v. N. H. 119*, 41 Am. Dec. 100; *App. 9 W. & S. 36*; *Alb. (Tex. Civ. App.)*, 37 S. W. 2d 100.

was valueless to the creditor,<sup>22</sup> or was of such a character as to make it speculative whether it would prove onerous or profitable.<sup>23</sup>

**§ 1233. Impairment of security by creditor's negligent in-action.**

Though negligent positive action by the creditor resulting in loss of security is a defence *pro tanto* to the surety, it has been held that mere negligent non-feasance on the part of the creditor in using security to the best advantage will not relieve the surety; as by failing seasonably to enforce a lien or mortgage on property not in the possession or under the care of the creditor;<sup>24</sup> by failing to protect a mortgage from destruction by a tax title;<sup>25</sup> by injudiciously failing to sell;<sup>26</sup> by failing to prove against the bankrupt estate of a principal debtor or co-surety,<sup>27</sup> or against the estate of a deceased principal debtor;<sup>28</sup> by failing to appropriate by way of set-off a balance due to the principal debtor;<sup>29</sup> by failing to insure mortgaged property, though authorized to do so in the mortgage,<sup>30</sup> or by otherwise allowing collateral to be destroyed or to deteriorate in value.<sup>31</sup>

also *Bedwell v. Gephart*, 67 Iowa, 44, 24 N. W. 585.

<sup>22</sup> *Hardwick v. Wright*, 35 Beav. 133; *Rainbow v. Juggins*, 5 Q. B. D. 422; *Lilly v. Roberts*, 58 Ga. 363; *Jones v. Hawkins*, 60 Ga. 52; *Armstrong v. Citizens &c. Bank*, 145 Ga. 861, 90 S. E. 44; *Green v. Blunt*, 59 Ia. 79, 12 N. W. 762; *Moss v. Pettingill*, 3 Minn. 217; *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49; *Loomis v. Fay*, 24 Vt. 240; *Farmers' State Bank v. Gray*, 94 Wash. 431, 162 Pac. 531. See also *Royal Indemnity Co. v. Beiseker*, 245 Fed. 346, 157 C. C. A. 538.

<sup>23</sup> *Coates v. Coates*, 33 Beav. 249.

<sup>24</sup> *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906; *Fuller v. Tomlinson*, 58 Ia. 111, 12 N. W. 127; *Freaner v. Yingling*, 37 Md. 491; *Clopton v. Spratt*, 52 Miss. 251; *Sheldon v. Williams*, 11 Neb. 272, 9 N. W. 86; *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N. W.

993; *Schroeppell v. Shaw*, 3 N. Y. 446; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Moorehead v. Daniels*, (Okl. 1915), 153 Pac. 623; *Baker v. Gaines Bros. Co.* (Okl. 1917), 166 Pac. 159; *Day v. Elmore*, 4 Wis. 190.

<sup>25</sup> *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

<sup>26</sup> *First Nat. Bank v. Waddell*, 74 Ark. 241, 85 S. W. 417; *Brick v. Freehold Nat. Banking Co.*, 37 N. J. L. 307; *Cherry v. Miller*, 7 Lea, 305. Cf. *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601.

<sup>27</sup> *Armstrong v. Citizens' &c. Bank*, 145 Ga. 861, 864, 90 S. E. 44, and see *infra*, § 1994.

<sup>28</sup> *Baker v. Gaines Bros. Co.*, (Okl. 1917), 166 Pac. 159.

<sup>29</sup> See *infra*, § 1235.

<sup>30</sup> *Willard v. Welsh*, 94 N. Y. App. D. 179, 88 N. Y. S. 173.

<sup>31</sup> *Loeb v. German Nat. Bank*, 88

On the other hand, the failure of the creditor to mortgage or transfer, whereby it is invalidated, has been held to excuse the surety to the extent of the loss of a chose in action assigned as security.

Ark. 108, 113 S. W. 1017; Kindt's Appeal, 102 Pa. 441; *In re Searight's Est.*, 163 Pa. 210, 29 Atl. 800.

In *Durfee v. Kelly*, 228 Mass. 571, 117 N. E. 907, 908, the court said: "If the value of the collateral which the payee held not merely for its own security but in trust for the indemnity of the sureties has been lost through forbearance or delay, no wrongful conduct of the payee appears. The sureties did not move. They could have discharged the debt at any time before depreciation set in and received the security. But having remained inactive, and there being no evidence of any affirmative act of negligence by the payee which resulted in their injury, the defendant has not been discharged either wholly or partially. *American Surety Co. v. Cinton*, 224 Mass. 337, 339, 340, 112 N. E. 954; *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518; *Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943; *Schroeppell v. Shaw*, 3 N. Y. 466; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *Uniontown Bank v. Mackey*, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485."

In *Rainbow v. Juggins*, L. R. 5 Q. B. 138, as security for an advance, the principal debtor deposited with the creditor a policy of life insurance, and subsequently became bankrupt, the advance remaining unpaid. The creditor proved against his estate the full amount of the advance without valuing the policy of life insurance as a security, which was in consequence claimed by the trustee in bankruptcy as part of the bankrupt's estate. It was contended by the surety in an action against him

by the creditor that he had neglected the policy, and so deprived the benefit of it, the creditor was charged him from all liability. It was held that the omission of the policy was at most a mere omission on the part of the creditor and as such did not discharge the defendant from all liability to the extent of the value of the policy. It will be observed, however, that the creditor's negligence was entirely nonfeasance. It is held for the full claim by the creditor, the trustee a right to the policy.

<sup>22</sup> *Capel v. Butler*, 21 S. W. 2d 1; *Watson v. Alcock*, 1 S. W. 2d 242; *Wulff v. Q. B.* 756; *Evans v. J.* 828, 35 C. C. A. 28; *St.* 59 Ark. 47, 26 S. W. 2d 1; *Dickerson*, 37 Ga. 428; *Ship Machine Co.*, 94 Ga. 901; *Trammell v. S.* Works, 121 Ga. 778, 49 S. E. 2d 1; *Atlanta Bank v. Warren*, 99 S. E. 797; *State Bank v. Mo.* 276, 21 S. W. 816; *2 Neb.* 265; *Schroeppell v. Y.* 446, 457; *Teaff v. R.* 469 (*cf.* *Coombs v. Pa.* 289, 49 Am. Dec. 45); *Bank v. Trexler*, 174 Pa. 195; *Bennett v. Taylor*, App. 30, 93 S. W. 704. *Philbrooks v. McEwen*, New York Nat. Ex. Bank v. Daly, 248, 250-251; *West v. T. B. McIntosh*, N. Y. App. D. 446, 524, 384 (*cf.* *Auto Brokerage & Smith Auto Co.* 106 N. Y. S. 188); *Ham*, 1 McC. Ch. 107; *Lang*, Strob. Eq. 59.

to notify the obligor of the chose in action of its assignment.<sup>33</sup> And where the creditor is in possession of property mortgaged or pledged to him, he is held to stricter accountability on that account. Thus the negligent failure to collect an assigned claim,<sup>34</sup> or the failure to charge an indorser on negotiable paper held as security,<sup>35</sup> or to exercise reasonable care in regard to perishable property,<sup>36</sup> excuses the surety to the extent of the loss. Where the principal is not charged with the consequences of his negligent inactivity, the reason generally given is that the surety might by his own activity in paying the debt and becoming subrogated to the security save himself from loss. It has been said that "so long as the surety chooses to remain passive, the creditor may also remain passive as regards the collection of his debts."<sup>37</sup> But the surety's defence in such cases must depend on equitable considerations. If the debt is due, and the surety knows about the facts it is true that he can protect himself by paying the debt and taking charge of the security himself, but if the debt is not due, or if the surety is ignorant of the existence of the collateral security, this argument loses its force. Moreover, in regard to matters of elementary business propriety, may not the surety assume, even though he knows the circumstances and might protect himself by paying the debt and yet fails to do so, that the creditor will not omit to exer-

In *Magney v. Roberts*, 129 Ia. 218, 222, 105 N. W. 430, the court said: "If a person of ordinary prudence would have avoided the error in the order of confirmation and preserved his lien by taking and recording a sheriff's deed, or, in event of proceeding to review, exacted adequate security, then Hendryx should have done so, and the surety was released to the extent of the loss occasioned by such failure."

<sup>33</sup> *Strange v. Fooks*, 4 Giff. 408.

<sup>34</sup> *Fennell v. McGowan*, 58 Miss. 261; *Shippen's Adm. v. Clapp*, 36 Pa. 89.

<sup>35</sup> *City Bank v. Young*, 43 N. H. 457, 462.

<sup>36</sup> In *Freaner v. Yingling*, 37 Md. 491, 499, the court said: "If . . . the creditor surrenders or abandons the fund or security, or, in case of the security consisting of perishable property, he allows it to be taken out of his possession and destroyed, or for the want of ordinary care and attention he suffers it to perish and become worthless in his hands, then, it is clear upon the plainest principles of justice, whatever loss is sustained should fall upon the creditor rather than the surety. The case of *Baker v. Briggs*, 8 Pick. 122, is an instance of this class."

<sup>37</sup> *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

cise some degree of care, though he cannot be held to the strict duties of a trustee? <sup>38</sup>

**§ 1234. Whether surrender of security of less value than claim ever totally discharges the surety.**

Though the statements are general that loss of security by the creditor involves the loss only of the value of his claim against the surety as equals the value of the security lost or surrendered, a distinction has been made in an English decision <sup>39</sup> between securities given to the creditor at the time of the original contract with the surety and securities given to the creditor later or under other circumstances. In the former case, it is said that the loss of the securities involves a change in the surety's contract to which, therefore, the surety's contract is discharged together. This seems a harsh rule. It may be correct that a change of risk imposing an uncertain addition to the liability on the surety can only be dealt with in fairness to the surety by discharging him altogether. But where the security is merely a readily ascertainable sum of money there seems no reason for imagining the surety has

<sup>38</sup> In *City Bank v. Young*, 43 N. H. 457, 461, the court said: "If, then, ordinary diligence is required in the case of a pawn, pledge, or mortgage, as between the immediate parties; and if the pawnee, pledgee, or mortgagee, must account to the principal for any loss caused by the want of such diligence, much more should he be held to account to the surety against whom the claim is one rather of strict law than otherwise. Indeed it would be absurd to hold that the surety would not be discharged by the negligence which would discharge the principal; and it would be equally absurd to contend that the duty of the creditor to use ordinary care was lessened by the fact that there was a surety. . . . Between this class of cases, namely, the release of securities by the direct

act of the creditor, and the loss of securities by want of ordinary care, no solid distinction."

<sup>39</sup> *Polak v. Everett*, 1 L. R. 100.

<sup>40</sup> If the security were a negotiable instrument, for instance, of the retention of the security by the creditor doubtless is of great importance as a means of pressure on the debtor than ordinary security of a mere saleable value; but such a distinction is exceptional, and not suggested by the facts in *Polak v. Everett*, 1 L. R. 100, 669, where the securities consisted of claims having a value of £4,000. The loss of the securities by the creditor was held to discharge the creditor from liability on the surety from liability of £6,000.

loss beyond that sum, and if he has not, it is obvious injustice to discharge him to a greater extent.<sup>41</sup>

**§ 1235. Creditor's refusal of tender by the principal discharges the surety.**

Actual tender of payment by the debtor discharges the surety.<sup>42</sup> The same consequences follow from refusal by the creditor of tender by the surety,<sup>43</sup> since the surety's rights against the principal may be impaired by delay. Anything short of actual tender by the principal, it has been said, will not discharge the surety. Thus a statement by the creditor that he does not care to have the debt paid at once is not of itself sufficient.<sup>44</sup> If the rule is not to be one of pure technicality, however, it should be held that if the creditor by positive word or act prevents the receipt of payment, which otherwise would have come to him, without demand or activity on his part, the surety should be excused.<sup>45</sup> The precision of a tender should be immaterial in defining an equitable defence. But a creditor is bound to no positive action to collect his claim. Therefore the failure by a creditor bank to appropriate the balance of a checking account as a set-off against a matured obligation,<sup>46</sup> or to appropriate a subsequent deposit,<sup>47</sup> will

<sup>41</sup> There seems no disposition in England to extend the decision of *Polak v. Everett*, 1 Q. B. D. 669, beyond its special facts. See *Rainbow v. Juggins*, 5 Q. B. D. 138; *Greenwood v. Francis*, [1899] 1 Q. B. 312, 322; *Taylor v. Bank of New South Wales*, 11 App. Cas. 596, 602. But *cf. infra*, § 1243.

<sup>42</sup> *Bartholow v. Bean*, 18 Wall. 635, 642, 21 L. Ed. 866; *Curiac v. Packard*, 29 Cal. 194; *Bonner v. Nelson*, 57 Ga. 433, 437; *Spurgeon v. Smith*, 114 Ind. 453, 17 N. E. 105; *Fisher v. Stockebrand*, 26 Kan. 565; *Sears v. Van Dusen*, 25 Mich. 351; *Johnson v. Ivey*, 4 Cold. 608, 94 Am. Dec. 206; *Watson v. Reed*, 1 Tenn. Ch. 196, 198; *Joslyn v. Eastman*, 46 Vt. 258. *Cf. State v. Alden*, 12 Ohio, 59.

<sup>43</sup> *Sharp v. Miller*, 57 Cal. 415;

*O'Connor v. Morse*, 112 Cal. 31, 44 Pac. 305.

<sup>44</sup> *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606. See also *White v. Life Association*, 63 Ala. 419, 35 Am. Rep. 45; *Life Association v. Neville*, 72 Ala. 517.

<sup>45</sup> See *Spurgeon v. Smith*, 114 Ind. 453, 456, 17 N. E. 105; *Johnson v. Mills*, 10 Cush. 503.

<sup>46</sup> So the failure of a creditor corporation to refuse to transfer the debtor's stock until the debt was paid (as the corporation had power to do), did not discharge a surety. *Perrine v. Firemen's Ins. Co.*, 22 Ala. 575.

<sup>47</sup> *Strong v. Foster*, 17 C. B. 201; *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415; *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep.

has matured prior to the request,<sup>53</sup> and that the principal is within the jurisdiction where the creditor resides.<sup>54</sup>

The excuse of non-residence has been held not lost by presence of property of the principal in the creditor's jurisdiction.<sup>55</sup> In some jurisdictions an offer to indemnify the creditor against costs of the suit must be made;<sup>56</sup> and in others, the request must state in terms that unless complied with the surety will no longer be liable.<sup>57</sup> Involuntary sureties or those who become such for their own advantage, as indorsers of negotiable paper who did not indorse for accommodation, are denied the privilege.<sup>58</sup> Apart from statute most courts have altogether

47 Pa. 476, it was held that the burden was on the creditor, who had been duly notified, to show that suit would have been futile.

<sup>53</sup> *Skales v. Cox*, 106 Ind. 261, 6 N. E. 622; *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Conrad v. Foy*, 68 Pa. 381; *Fidler v. Hershey*, 90 Pa. 363, 366.

<sup>54</sup> *Davie v. Hatcher*, 1 Woods, C. C. 456; *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934; *Conklin v. Conklin*, 54 Ind. 289; *Phillips v. Riley*, 27 Mo. 386; *Warner v. Beardsley*, 8 Wend. 194; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650. In *Alcorn v. Commonwealth*, 66 Pa. 172, an instruction that if the principal at the time of the notice had moved out of the county and taken all his property with him the surety was not discharged, but that otherwise he was, was held as favorable to the surety as he could require. But in *Hayward v. Fullerton*, 75 Ia. 371, 39 N. W. 651, and *Meriden, etc., Co. v. Flory*, 44 Ohio St. 430, 7 N. E. 753, the court construed the local statutes which gave the surety his right as applicable even though neither the principal, nor so far as appears any property belonging to him, was within the creditor's State.

<sup>55</sup> *Conklin v. Conklin*, 54 Ind. 289. But see *contra*, *Hancock v. Bryant*, 2 Yerg. 476.

<sup>56</sup> *Huey v. Pinney*, 5 Minn. 310;

*Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Dillon v. Russell*, 5 Neb. 484.

<sup>57</sup> *Campbell v. Sherman*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735; *Jackson v. Huey*, 10 Lea, 184, 42 Am. Rep. 301.

<sup>58</sup> See *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Fensler v. Prather*, 43 Ind. 119; *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316.

In *Wells v. Mann*, 45 N. Y. 327, 330 (6 Am. Rep. 93), the court said: "This case [*Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369] was regarded as introducing a new rule, and while the rule has been adhered to in cases strictly analogous, the courts have been disinclined to extend it. (*Trimble v. Thorn*, 16 Johns. 152; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Herrick v. Borst*, 4 Hill, 650; *Pitt v. Congdon*, 2 Comst. 352, 51 Am. Dec. 299.) In *Trimble v. Thorn*, the court refused to apply it in an action by the holder of a promissory note against an indorser, who had indorsed and transferred it for value, on the ground that although an indorser is in the nature of a surety, he is answerable upon an independent contract. Nor has it been extended to engagements which, though collateral in form, were entered into for the benefit of the surety, subsequent to the original transaction, and upon a new or independent consideration."

**§ 1237. A surety is not entitled to notice of the principal's default.**

An indorser of negotiable paper is liable only upon condition that demand has been made at maturity upon the party primarily liable, and prompt notice given to the indorser of that party's default. This, however, is a rule peculiar to indorsers and has no general application to the law of suretyship. An accommodation maker though he would be discharged by inequitable dealing of the holder with an indorser known by the holder to be the principal debtor,<sup>61</sup> is not entitled to have demand first made upon the indorser or to notice that the indorser has failed to fulfil the duty of such an indorser to such a maker of paying the note at maturity.<sup>62</sup> And aside from the case of parties secondarily liable on negotiable paper, there is little authority for treating the obligation of any surety as either conditional upon prior demand<sup>63</sup> upon the principal debtor, or excused by the creditor's failure to make such a demand, unless the obligation is either made so in express terms<sup>63</sup> or by necessary implication as in a guarantee of collectibility.<sup>64</sup> Nor, except in the case of a guarantor, is

<sup>61</sup> See *infra*, § §1259, 1260.

<sup>62</sup> Neg. Inst. Law, Sec. 60, *infra*, § 110.

<sup>63</sup> Walton v. Mascall, 13 M. & W. 72, 452; Avery Drug Co. v. Ely Robertson-Barlow Drug Co., 194 Ala. 507, 69 So. 931; Crawford v. Chattanooga Sav. Bank, (Ala. 1919), 82 So. 163; Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; Gage v. Mechanics' Nat. Bank, 79 Ill. 62; Booth v. Irving Nat. Exch. Bank, 116 Md. 668, 674, 82 Atl. 652; Carr v. Card, 34 Mo. 513; Allen v. Rightmere, 20 Johns. 365, 11 Am. Dec. 288; Eccleston v. Sands, 108 N. Y. App. Div. 147, 95 N. Y. S. 1107; First Nat. Bank v. Story, 53 N. Y. Misc. 429, 103 N. Y. S. 233; Haynes v. Synnott, 160 Pa. 180, 28 Atl. 832; Wallace v. Richards, 16 Utah, 52, 50 Pac. 804; Essex v. Park, 11 Up. Can. C. P. 473. But see *contra* Smith v. Bainbridge, 6 Blackf. 12; Howe v. Nickels, 22 Me. 175.

<sup>64</sup> First Nat. Bank v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154.

<sup>64</sup> It has been held in Pennsylvania that a guaranty without more amounts simply to a guaranty of collectibility. Isett v. Hoge, 2 Watts, 128; Brown v. Brooks, 25 Pa. 210; Hoffman v. Bechtel, 52 Pa. 190; National Loan, etc., Society v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359; Hartman v. First Nat. Bank, 103 Pa. 581; Tissue v. Hanna, 158 Pa. 384, 27 Atl. 1104. But the Federal court in deciding a case involving Pennsylvania law, asserted that the question was one of general commercial law, Court in holding a general guaranty of payment depended upon the exercise of due diligence in collecting from the principal debtor, was anomalous and not to be followed. Johnson v. Charles D. Norton Co., 159 Fed. 361, 86 C. C. A. 361. The Pennsylvania

principal's default. Where the performance is indefinite in amount or time, though many cases sustain the same rule,<sup>68</sup> there is much authority supporting the guarantor's right to notice of default.<sup>69</sup> On principle it seems that the latter decisions are right wherever the situation is such as to bring the guaranty within the rule that "where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."<sup>70</sup>

685; *Volts v. Harris*, 40 Ill. 155; *Frash v. Polk*, 67 Ind. 55; *Kline v. Raymond*, 70 Ind. 271 (but see *Gaff v. Sims*, 45 Ind. 262; *Ward v. Wilson*, 100 Ind. 52; *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302 (overruling expressions in earlier decisions); *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803; *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581); *Douglass v. Howland*, 24 Wend. 35; *Barhydt v. Ellis*, 45 N. Y. 107; *Conant v. Jones*, 50 N. Y. App. D. 336, 64 N. Y. S. 189; *Weiler v. Henarie*, 15 Oreg. 28, 13 Pac. 614; *Bank v. Hammond*, 1 Rich. 281; *Carroll County Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. 313; *Hunter v. Dickinson*, 10 Humph. 37 (but see *Kannon v. Neely*, 10 Humph. 288; *Rhodes v. Morgan*, 1 Baxt. 360); *Mallory v. Lyman*, 3 Pinn. (Wis.) 443. But see *contra*—*Ringgold v. Newkirk*, 3 Ark. 96.

<sup>68</sup> *Treeweek v. Howard*, 105 Cal. 434, 39 Pac. 20 (statutory); *Redfield v. Haight*, 27 Conn. 31; *Kincheloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Lowe v. Beckwith*, 14 B. Mon. 184, 58 Am. Dec. 659; *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257; *Booth v. Irving Nat. Exch. Bank*, 116 Md. 668, 82 Atl. 652; *Farmers' &c. Bank v. Kercheval*, 2 Mich. 504; *Grant v. Hotchkiss*, 26 Barb. 63; *Yancey v.*

*Brown*, 3 Sneed, 89; *Train v. Jones*, 11 Vt. 444; *Noyes v. Nichols*, 28 Vt. 159.

<sup>69</sup> *Reynolds v. Douglass*, 12 Pet. 497, 9 L. Ed. 1171; *Wildes v. Savage*, 1 Story, 22; *Dunbar v. Brown*, 4 McL. 166; *Cahuzac v. Samini*, 29 Ala. 288; *McCullum v. Cushing*, 22 Ark. 540 (see *Falls City Const. Co. v. Boardman*, 111 Ark. 415, 163 S. W. 1134); *Mayberry v. Bainton*, 2 Harringt. 24; *Mamerow v. National Lead Co.*, 206 Ill. 626, 69 N. E. 504, 99 Am. St. Rep. 196 (see also *Fort Dearborn Nat. Bank v. Miller*, 178 Ill. App. 450); *Smith v. Bainbridge*, 6 Blackf. 12; *Furst, etc., Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Stewart v. Knight, etc., Co.*, 166 Ind. 498, 76 N. E. 743; *Young v. Merle &c. Mfg. Co.*, 184 Ind. 403, 110 N. E. 669; *Davis Sewing Mach. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Howe v. Nickels*, 22 Me. 175; *American Agr. Chem. Co. v. Ellsworth*, 109 Me. 195, 83 Atl. 546; *Clark v. Remington*, 11 Met. 361; *Vinal v. Richardson*, 13 All. 521; *Bishop v. Eaton*, 161 Mass. 496, 501, 37 N. E. 665, 42 Am. St. Rep. 437; *Montgomery v. Kellogg*, 43 Miss. 486, 5 Am. Rep. 508; *Rankin v. Childs*, 9 Mo. 665; *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

<sup>70</sup> *Vyse v. Wakefield*, 6 M. & W. 442. See *supra*, § 894.

But generally it is held, where notice to the surety that the lack of it is an excuse which he has the burden of proving, rather than the existence of notice a condition which the creditor must prove.<sup>71</sup> Failure to give notice of default, when such notice is held necessary, has no effect to afford appellant a defence to the extent of his sustained loss or damage as a result of such failure;''<sup>72</sup> unless an express stipulation in the contract gives it a greater effect.<sup>73</sup> It should be observed, however, that notice may be made an express condition of the contract; and the contracts of compensated sureties often contain such a condition.<sup>74</sup>

**§ 1238. Notice when required must be given within a reasonable time.**

Where lack of notice of default may discharge a creditor in order to protect himself must not only be given but the notice must be sent within a reasonable

<sup>71</sup> See cases cited in next to the last note.

<sup>72</sup> *Swisher v. Deering*, 204 Ill. 203, 206, 68 N. E. 517. To the same effect see *Davis v. Wells, Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 686; *Illinois Surety Co. v. Huber*, 57 Ind. App. 408, 107 N. E. 298; *McClure v. Freeborn & Co.*, 97 Kans. 695, 156 Pac. 692; *American Ag. Chem. Co. v. Ellsworth*, 109 Me. 195, 197, 83 Atl. 546; *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 433, 94 N. E. 803; *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165; *Bross v. McNicholas*, 66 Oreg. 42, 133 Pac. 782, Ann. Cas. 1915 B. 1272.

<sup>73</sup> See *American Indemnity Co. v. Board* (Tex. Civ. App.), 200 S. W. 592.

<sup>74</sup> *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193, 22 Sup. Ct. 833; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *United States Fidelity, etc., Co. v. Rice*, 148 Fed. 206, 78 C. C. A. 164; *United States v. Fidelity, etc., Co.*, 224 Fed.

866, 140 C. C. A. 288; *Fidelity & Co. v. Wells*, 42, 160 C. C. A. 182; *Fidelity v. Robertson*, 136 Ala. 3; *Bankers' Surety Co. v. Cook*, 492, 177 S. W. 20; *Seaboard Cook Brewing Co.*, 111 S. E. 413; *Savannah I. Fidelity & Co.*, (Ga. S. E. 113; *Hughes v. Glendon Co.*, 139 Minn. 417, 16 S. E. 413; *Hurley v. Fidelity, etc.*, 88, 68 S. W. 958; *Illinois Surety Co.*, 170 S. E. 261, 155 N. Y. S. 1041; *Savannah I. Fidelity & Co.*, 179 Pac. 488; *Co. v. Heinzerling*, 39 Pac. 742; *Montreal Fidelity & Co. v. Guarantee*, 542. See also *land Casualty Co.*, 71 Atl. 900, 93 Am. St. Rep. 196; *Furst, etc.*, 111 Ind. 308, 315

<sup>75</sup> *Mamerow v. National Surety Co.*, 206 Ill. 626, 69 N. E. 5; *Rep. 196; Furst, etc.*, 111 Ind. 308, 315

notice is given promptly the analogy of the law governing notice to parties secondarily liable on negotiable paper, makes the inference strong that the notice is sufficient although by chance, events follow one another so quickly that the surety loses an opportunity to protect himself. On the other hand, though notice is long delayed, unlike the rule for parties secondarily liable on negotiable instruments, the guarantor is not discharged if in fact no injury is caused him by the delay;<sup>76</sup> unless the contract itself makes the giving of notice within a specified time or immediately an express condition. If so, the condition must be fulfilled.<sup>77</sup>

**§ 1239. Variation or alteration of the contract between creditor and principal if it varies the surety's contract discharges him.**

The surety can be held only to the contract which he has made. This contract may be in terms identical with the contract of the principal, as where both sign an obligation absolute in terms; or the surety's contract though not identical in terms with the principal's may adopt as part of itself the contract with the principal; as where the surety guarantees the principal's performance of a specific contract. It is obvious that in either of such cases a change in the contract agreed upon by creditor and principal without the consent of the surety will discharge the latter from any liability for a subsequent breach of the altered contract.<sup>78</sup> He cannot

*Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334; *Sentinel Co. v. Smith*, 143 Wis. 377, 380, 127 N. W. 943.

<sup>76</sup> See cases cited in the preceding section, and in the first note in this section.

<sup>77</sup> *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193, 22 Sup. Ct. 833; *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379, 34 So. 933; *Bankers' Surety Co. v. Watt*, 118 Ark. 492, 177 S. W. 20; *Larrabee v. Title Guaranty, etc., Co.*, 250 Pa. 135, 95 Atl. 416; *Montreal Harbor Commissioners v. Guarantee Co.*, 22 Can. Sup. Ct. 542.

<sup>78</sup> But a new contract between principal and creditor though relating to the same matter does not necessarily discharge the original contract. The second may be collateral or cumulative; *Stewart v. Johnson*, 87 Ga. 97, 13 S. E. 258; *State v. Mitchell*, 132 Ind. 461, 32 N. E. 86; *Abshire v. Rowe*, 112 Ky. 545, 66 S. W. 394, 56 L. R. A. 936, 99 Am. St. Rep. 302; *Brooks v. Whitmore*, 142 Mass. 399, 8 N. E. 117; as where a note taken from a principal debtor who is in default is taken as collateral security. *Barker v. United States Fidelity &c. Co.*, 228 Mass. 421, 117 N. E. 894.

cases the surety's defence, if he has one, is equitable and not *stricti juris*. That he has an equitable defence, if the change in the principal's contract materially affects the risk of his own and the creditor was a party to this change of risk, will appear from the following sections. It is true that it will not often be important whether the surety's defence is equitable or is based on an insistence on the strict terms of his contract, and it is also true that the line dividing the two classes of cases is shadowy, since it is not always easy to say whether or not the surety's promise incorporates by reference into itself all the terms of the principal's contract.<sup>82</sup> Nevertheless, it is desirable to make the distinction in order to protect the creditor in some instances from loss of his claim against the surety, where the terms of the latter's contract are not sought to be varied, and the change in the contract of principal and creditor has no material effect upon the surety's risk.<sup>83</sup>

<sup>82</sup> The distinction is suggested in *Museum of Fine Arts v. American Bonding Co.*, 211 Mass. 124, 127, 97 N. E. 633. "If the agreement between the plaintiff and Stannard, for the due performance of which by Stannard the defendants severally bound themselves as sureties, was materially changed by the action of the plaintiff and Stannard without the knowledge and consent of the defendants, they would be discharged from any further liability. *Warren v. Lyons*, 152 Mass. 310, 312, 25 N. E. 721; *Germania Fire Ins. Co. v. Lange*, 193 Mass. 67, 69, 78 N. E. 746. If without such change the plaintiff gave up or parted with any security which it had from Stannard, or any means of payment to which under its contract it was entitled for the satisfaction of whatever demand might accrue to it against him by virtue of the contract between them or any right which otherwise would have been available to the defendants as an indemnity or a protection to diminish their loss under their respective contracts of suretyship, then their liability

would be diminished to the extent of what was thus parted with. They would not be wholly discharged unless the value of what had been given up equalled the total amount of their liability; but they would be relieved *pro tanto*. *Guild v. Butler*, 127 Mass. 386; *St. John's College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994."

<sup>83</sup> In *Ward v. National Bank*, 8 App. Cas. 755, the variation of contract was made with M, a co-surety of the defendant, not with the principal debtor, but since, as between M and the defendant each was a principal as to part of the debt, and a surety as to the remainder, the question involved is the same as if M had been a principal debtor. See *infra*, § 1263. The change in question, however, an increase in the amount which M guaranteed if it affected the defendant at all, would increase rather than diminish his right of contribution, and the court held the defendant's liability to the creditor unaffected.

Under the principles stated in the preceding the creditor varies the terms of his agreement with the principal, a surety who has contracted only to answer for performance of the original contract will be discharged of liability for breaches of the altered contract.<sup>84</sup> The

**“Whitcher v. Hall, 5 B. & C. 269; Northwestern Ry. Co. v. Whinray, 10 Ex. 77; United States v. Freil, 186 U. S. 309, 46 L. Ed. 1177, 22 Sup. Ct. 875; Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366, 17 U. S. App. 442; St. Louis Co. v. Hayes, 71 Fed. 110, 17 C. C. A. 634, 30 U. S. App. 529; United States v. McIntire, 111 Fed. 590; Parke & Lacy Co. v. White River Lumber Co., 110 Cal. 658, 43 Pac. 202; Rowan v. Sharps' Rifle Mfg. Co., 33 Conn. 1; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; State v. Spittler, 79 Conn. 470, 65 Atl. 949; Bethune v. Dozier, 10 Ga. 235; Little Rock Furniture Co. v. Jones, 13 Ga. App. 502, 79 S. E. 375; Zimmerman v. Judah, 13 Ind. 286, 22 Ind. 388;**

Hubbard *v.* First Sta  
App. 1916), 114 N. E. ( Ward, 1 Kans. App. 6  
Kans. App. 289, 51 P  
&c. Co. *v.* International  
La. 409, 37 So. 10; Plu  
Sewing Machine Co.,  
36 Atl. 115; Schwart  
Surety Co., 231 Mas  
E. 424; Erickson *v.* Br  
10, 55 N. W. 62; Wyn  
western Co. (Miss.), 8  
*v.* Kiso, 81 Mo. 241; Be  
Mo. 179, 22 S. W. 620; E  
125 Mo. 72, 28 S. W.  
Inv. Co. *v.* Kansas C  
Scales Co. (Mo.), 20  
Johannes *v.* St. Reg  
(Mo. App.), 188 S. W.  
*v.* Sheldon, 35 Neb. 2  
1104; Watriss *v.* Pierce,  
Bangs *v.* Strong, 7 Hil  
Dec. 64, 4 N. Y. 315; I  
137 N. Y. 307, 33 N. 1  
St. Rep. 731; Smith *v.* M  
Y. 241, 42 N. E. 669;  
ence Iron Co., 222 N.  
E. 629; New York L. In  
81 N. Y. App. D. 92,  
Metropolitan Trust Co  
N. Y. App. D. 442, 139  
Northern Light Lodge  
7 N. D. 146, 73 N. `'  
*v.* Dulaney (Okl.), 1  
Cottage Home Remedy  
(Okl.), 162 Pac. 185;  
Co. *v.* Banigan, 36 R. I.  
Lane *v.* Scott, 57 Tex.  
*v.* Watson, 76 Tex. 25,  
Heldenfels *v.* School '  
Civ. App.), 182 S. W  
land Life Ins. Co. *v.*

of a building contractor will be discharged by any material change agreed upon between owner and contractor.<sup>85</sup> A change in the covenants of a lease without the consent of a guarantor will discharge him.<sup>86</sup>

A fidelity bond for a "clerk and storekeeper" will not bind the surety for the fidelity of the employee after he has been made merely "clerk" at a reduced salary, the office of storekeeper being given to another.<sup>87</sup> A change in the person who undertakes the performance as principal for which the surety has bound himself is also fatal. A surety's agreement to be answerable for A's default under a contract which does not contemplate assignment will not bind the surety for a default of A's assignee.<sup>88</sup> And a surety for the debts

Civ. App.), 211 S. W. 460; *Nichols v. Palmer*, 48 Wis. 110, 4 N. W. 137; *Titus v. Durkee*, 12 Up. Can. C. P. 367.

<sup>85</sup> *Miller v. Friedheim*, 82 Ark. 592, 102 S. W. 372; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760; *State v. Hillis* (Ind. App.) 124 N. E. 515; *Bartlett v. Illinois Surety Co.*, 142 Ia. 538, 119 N. W. 729; *Police Jury, etc., of Vernon v. Johnson*, 111 La. 279, 35 So. 550; *Schwartz v. American Surety Co.*, 231 Mass. 490, 121 N. E. 424; *Norwegian Congregation v. United States Fidelity, etc., Co.*, 83 Minn. 269, 86 N. W. 330; *Poe v. Cameron*, 130 Minn. 15, 153 N. W. 129 (cf. *Milavetz v. Oberg*, 138 Minn. 215, 164 N. W. 910); *Utterson v. Elmore*, 154 Mo. App. 646, 136 S. W. 9; *St. Johns College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994; *Enterprise Hotel Co. v. Book*, 48 Or. 58, 85 Pac. 333; *Zang v. Hubbard, etc., Co.* (Tex. Civ. App.), 125 S. W. 85 (cf. *Garrett v. Dodson* (Tex. Civ. App.), 199 S. W. 675); *Kracht v. Enterprise State Surety Co.*, 62 Wash. 339, 113 Pac. 773. The change may be so immaterial that the surety will not be discharged. *Bankers' Surety Co. v. Elkhorn &c. Dist.*, 214 Fed. 342, 130 C. C. A. 650; *Kennett v.*

*Katz Const. Co.*, 273 Mo. 279, 202 S. W. 558; *Maryland Casualty Co. v. Wellston*, 47 Okl. 417, 148 Pac. 691; *O'Neil Engineering Co. v. Lehigh* (Okl.) 182 Pac. 659. Nor will he be if the changes are made before the surety signs his contract and are known to the surety. *Columbia Security Co. v. Aetna Accident &c. Co.* (Wash.), 183 Pac. 137.

<sup>86</sup> *Ziegler v. Hallahan*, 126 Fed. 788; *Berman v. Shelby*, 93 Ark. 472, 125 S. W. 124; *New York v. Clark*, 84 N. Y. App. Div. 383, 82 N. Y. S. 855. Cf. *Laskey v. Bew*, 22 Cal. App. 393, 134 Pac. 358. Accepting for several months a reduced rent and giving the tenant a receipt in full will not release the sureties on the tenant's bond from liability for other defaults. *Dodge v. Chapman* (Cal. App.), 183 Pac. 966. A guarantee of a sublease is not discharged by the sublessor's surrender of his lease, and the acquisition of his interest by others to whom the sublessee paid the rent. *Brewster Cigar Co. v. Atwood* (Wash.), 182 Pac. 564.

<sup>87</sup> *King v. Herron* [1903] 2 I. R. 474. Cf. *Marshall v. Brainerd*, 253 Pa. 35, 97 Atl. 1057.

<sup>88</sup> *Northern Minn. Drainage Co. v. Equitable Surety Co.*, 131 Minn.

of a co-partnership is not liable for debts incurred in change in the firm;<sup>89</sup> or after the assumption of the firm by a receiver of the debtor.<sup>90</sup> Nor will engagements of an individual continue when another is associated with him as partner.<sup>90a</sup>

Likewise a guaranty given to a firm covering its obligations arising from dealings with another will not be affected by a change in the membership of the firm.<sup>90b</sup> A mere formal change, not fatal. Thus in the case of a continuing guaranty change simply in the name of a corporation has not been held to affect the guaranty,<sup>91</sup> and there is a di-

243, 154 N. W. 1092; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38. See also *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Brill v. Friedhoff*, 102 N. Y. Misc. 565, 169 N. Y. S. 193; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

<sup>89</sup> *Backhouse v. Hall*, 6 B. & S. 507; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Burch v. De Rivera*, 53 Hun, 367, 24 N. Y. St. Rep. 770; *Standard Oil Co. v. Arnestad*, 6 N. Dak. 255, 69 N. W. 197, 34 L. R. A. 861. See also *Peery v. Merrill* (Okl.), 179 Pac. 28. Cf. *Palmer v. Bagg*, 56 N. Y. 523; *Hayden v. Hill*, 52 Vt. 259.

In *Richardson v. Steuben County*, 226 N. Y. 13, 122 N. E. 449, however, a guaranty of performance by the "George W. Hallock Bank" was held not invalidated by a change of membership of the partnership owning the bank. It was found that the surety did not know whether the bank was a partnership or a corporation, and the court held that the contract was made with reference to the bank as an institution, relying upon *Barclay v. Lucas*, 1 T. R. 292; *Metcalf v. Bruin*, 12 East, 400.

<sup>90</sup> *Hanna v. Florence*, 100 N. Y. 290, 118 N. E. 61.

<sup>90a</sup> *Spokane Union & Ry. Co. v. Maryland Casualty Co.*, 100 Pac. 3.

<sup>90b</sup> *Myers v. Edge*, 100 N. Y. 290, 118 N. E. 61; *Strange v. Lee*, 3 East, 400; *Oakes*, 4 Russ. Ch. 100; *Plum*, 75 N. J. L. 883, 12 L. R. A. (N. S.) 1231; *Watson*, 16 Johns. 100; *Montgomery*, 3 Tex. 199; *Cox & Malting Co. v. Starr*, 100 N. Y. 290, 118 N. E. 61; *In Crane Co. v. Specht*, 57 N. W. 1015, 42 Am. Rep. 13. The court held that a change in the name of a corporation does not invalidate a guaranty made for future dealings—an unsound result, opposed to cases cited.

<sup>91</sup> *Scovill Mfg. Co. v. City of Chicago*, 114 N. E. 181, 1918 E. 602; citing *City of Chicago v. Phelps*, 97 N. Y. 44, 49 N. E. 100. See also *Bradford Oldfield v. John Davis Co.*, 37 Sup. Ct. 614, 61 L. Ed. 117, 117 N. Y. 196; *Springfield Lighting Co. v. King*, 74 S. Car. 251, 108 S. E. 227, 68 S. W. 2d 227. But see *Crane Co. v. Specht*, 57 N. W. 1015, 42 Am. Rep. 13.

treat slight variations in the contract less strictly in favor of a compensated surety than in favor of a gratuitous surety.<sup>92</sup> If the creditor has not assented to a discharge of the original debtor the surety will be liable for the debtor's failure to perform as well where he attempts performance by an assignee or agent as where he undertakes to continue the work himself;<sup>93</sup> and where the performance guaranteed is merely the payment of money, an assignment by the principal of the right to enjoy the consideration for which the money is payable, the principal still remaining liable to pay this, will not discharge the surety.<sup>94</sup>

A surety is none the less discharged by a change in the terms of the principal's contract, for the performance of which the surety has bound himself, when the change might not be thought disadvantageous to him.<sup>95</sup> But an agreement merely to remit part of the performance due from the principal without changing its character, as by lessening the amount of rent to be paid under a guaranteed lease,<sup>96</sup> or by providing for a lower rate of interest on a debt than the contract provides for,<sup>97</sup> or by waiving a portion of the perform-

123, 57 N. W. 1015, 42 Am. St. Rep. 562.

<sup>92</sup> *Justice v. Empire State Surety Co.*, 209 Fed. 105; *American Bonding Co. v. United States*, 233 Fed. 364, 147 C. C. A. 300; *Doyle v. Faust*, 187 Mich. 108, 153 N. W. 725; *Butz v. United States Metal Products Co.*, 255 Pa. 53, 99 Atl. 169. See also *People v. Traves*, 188 Mich. 345, 154 N. W. 130; *Young v. American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; and *supra*, § 625.

<sup>93</sup> *Los Angeles Stone Co. v. National Surety Co.*, 178 Cal. 247, 173 Pac. 79; *First Baptist Church v. Hendricks*, 107 Miss. 267, 65 So. 244.

<sup>94</sup> *Johnson v. Bernstein (Ia.)*, 155 N. W. 266 (guaranty of rent under a lease). See also *Brewster Cigar Co. v. Atwood (Wash.)*, 182 Pac. 564.

<sup>95</sup> *Blest v. Brown*, 8 Jur. N. S. 602, 603; *Clark v. Gerstley*, 26 Dist. Col. App. 205, *affd.* in 204 U. S. 504, 27

Sup. Ct. 337; *Cartmel v. Newton*, 79 Ind. 1; *Schwartz v. American Surety Co.*, 231 Mass. 490, 121 N. E. 424; *Poe v. Cameron*, 130 Minn. 15, 153 N. W. 129; *Neuwirth v. Moydell*, 188 Mo. App. 467, 174 S. W. 206; *Bangs v. Strong*, 7 Hill, 250, 42 Am. Dec. 64; *American Bonding Co. v. Kelly*, 172 N. Y. App. D. 437, 158 N. Y. S. 812; *Bauschard Co. v. Fidelity &c. Co.*, 25 Pa. Super. 370; *Dey v. Martin*, 78 Va. 1; *Spokane Union Stockyards Co. v. Maryland Casualty Co. (Wash.)*, 178 Pac. 3; *Leonard v. County Court*, 25 W. Va. 45; *Titus v. Durkee*, 12 U. C. (C. P.) 367.

<sup>96</sup> *Preston v. Huntington*, 67 Mich. 139, 34 N. W. 279; *Dodd v. Vucovich*, 38 Mont. 188, 99 Pac. 296.

<sup>97</sup> *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193. *Cf.* decisions holding even a beneficial alteration of the writing itself discharges a party to it. *Infra*, § 1903.

the defendant guaranteed that a flock of sheep leased with certain premises should be returned at the expiration of the lease in good condition, a surrender, agreed upon by the tenant and landlord, of a field belonging to the leased premises discharged the surety.<sup>3</sup>

**§ 1242. A variation of the contract between creditor and principal impliedly authorized by the original contract between them will not discharge a surety.**

A variation of the principal's contract which under the terms of the original agreement should have been anticipated as a possibility, will not discharge the surety. Thus where a lease contained a provision allowing subletting with the written consent of the lessor, a subsequent subletting with the consent of the lessor does not excuse a guarantor.<sup>4</sup> So when a building contract provided that alteration in the plans might be made, or payments made otherwise than the contract provided, reasonable alterations in the plans<sup>5</sup> or changes in the times of payment,<sup>6</sup> will not release a surety; and illustrations in other contracts may be found.<sup>7</sup> This principle has been held applicable by some courts to the obligation of sureties on the bonds of tax collectors. A change by the legislature, after the making of the bond, of the time allowed for the collection of taxes has been held not to discharge the surety on the ground

<sup>3</sup> *Holme v. Brunskill*, 3 Q. B. D. 495. See also *Nazareth &c. Mach. Co. v. Marshall &c. Co.*, 258 Pa. 558, 569, 102 Atl. 268.

<sup>4</sup> *Sagal v. Mann*, 89 Conn. 576, 580, 95 Atl. 6. See also *Benjamin v. Hillard*, 64 U. S. 149, 165, 16 L. Ed. 518, 521; *Jones v. Hoyt*, 25 Conn. 374; *Lowry v. Adams*, 22 Vt. 160; *Bothfeld v. Gordon*, 190 Mass. 567, 572, 573, 77 N. E. 639, L. R. A. (N. S.) 794, 112 Am. St. Rep. 341.

<sup>5</sup> *Graham v. United States*, 231 U. S. 474, 58 L. Ed. 319, 34 Sup. Ct. 148; *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 405, rehearing denied in Supr. Ct., 150 Pac. 411; *Equitable Surety Co. v. Connors*, 27 Colo. App. 213, 147 Pac. 438; *School*

*District v. United States, etc., Guaranty Co.*, 96 Kan. 499, 152 Pac. 668; *Doyle v. Faust*, 187 Mich. 108, 153 N. W. 725; *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314; *Kennett v. Katz Const. Co.*, 273 Mo. 279, 202 S. W. 558; *Burt County v. Lewis*, 93 Neb. 690, 141 N. W. 1032; *Johnson v. Merten*, 95 Neb. 174, 145 N. W. 264; *Coyle v. United States Gypsum Co.*, (Okl. 1917), 166 Pac. 439.

<sup>6</sup> *Justice v. Empire State Surety Co.*, 209 Fed. 105; *Zang v. Hubbard, etc., Realty Co.* (Tex. Civ. App.), 125 S. W. 85.

<sup>7</sup> *United States, etc., Guaranty Co. v. Travellers', etc., Mach. Co.*, 167 Ky. 382, 180 S. W. 815, 169 Ky. 158, 183 S. W. 492.

that the surety must be assumed to have signed knowledge that the legislature might alter the doctrine, however, is not accepted by other States.<sup>9</sup> It has been held that sureties on a fidelity bond are presumed to have contracted with reference to additional duties subsequently imposed on the official whose fidelity is guaranteed. No trouble with this is the extent to which it logically can be carried if accepted at all. If the surety is charged with knowledge that any material alterations may be made in the principal's obligation, there seems very little limit to the changes to which the surety must be deemed to have assented in advance. Such presumption of assent beyond the slight changes naturally incident to business is obviously based on fiction. Where performance of a contract with a corporation "its successors and assigns" is guaranteed, it was held that there was no implied guaranty of performance by a receiver of the corporation.

**§ 1243. The creditor's variation in the performance of a contract with the principal may discharge the surety.**

It may now be supposed that the contract between the creditor and principal remains unchanged but that the performance is not in accordance with its terms. The surety is bound by the contract. He has agreed that a certain performance shall be rendered, and has inserted ordinarily no express condition that his obligation shall depend upon the exact performance.

<sup>9</sup> *State v. Carleton*, 1 Gill, 249; *State v. Swinney*, 60 Miss. 39, 45 Am. Rep. 405; *Prairie v. Worth*, 78 N. C. 169; *Worth v. Cox*, 89 N. C. 44; *Commonwealth v. Holmes*, 25 Gratt. 771; *Smith v. Commonwealth*, 25 Gratt. 780; *Bennett v. Auditor*, 2 W. Va. 441. See also as to statutory bonds to secure payment of those employed to work on public buildings, *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

<sup>10</sup> *Davis v. People*, 6 Ill. 409; *People v. McHatton*, 7 Ill. 638; *State v. Roberts*, 68 Mo. 234, 30 Am. Rep. 788;

*Schuster v. Weiss*, 114 N. D. 21 S. W. 438, 19 L. R. A. 388; *v. Hacker*, 8 Heisk. 388.

<sup>11</sup> *Melville v. Dodge*, 6 L. R. A. 450; *Minor v. Mechanics' Bldg. Assn.*, 40, 73, 7 L. Ed. 47; *Fidelity v. Gate City Nat. Bank*, 9 S. E. 392, 33 L. R. A. 82; *Richmond & Kasey*, 30 Gratt. 218; *Winstead Bldg. Assoc.*, 76 W. S. E. 637. Cf. *Bassett Surety Co.*, 210 Ill. App. 4.

<sup>12</sup> *Hanna v. Florence I. Co.*, 118 N. Y. 290, 118 N. E. 629.

the creditor of his contract with the principal. Nevertheless it is obvious that the surety's risk may be varied by the creditor's conduct, and, if it is, the surety should be discharged. Therefore, any breach by the creditor of his contract with the principal, if he thereby varies the surety's risk, discharges him. Thus, a failure to insure premises, the building of which the surety guaranteed, was held to excuse him where the contract between the creditor and the principal required, not merely permitted, the creditor to insure.<sup>12</sup> Even though the creditor's variation from his promise is favorable to the principal, so that he could make no objection, the surety may be freed. A common illustration of this arises where premature payment is made to a contractor whose performance has been guaranteed. Such payment in larger amounts, or at earlier times than the contract between the principal and his employer fixed discharges the surety.<sup>13</sup> But the basis of the rule is

<sup>12</sup> *Watts v. Shuttleworth*, 5 H. & N. 235, 7 H. & N. 353. See also the following cases where the creditor's failure to comply with the terms of his contract with the principal discharges the surety. *Watson v. Allcock*, 4 D. M. & G. 242; *Lawrence v. Walmsley*, 12 C. B. (N. S.) 799; *Pioneer Savings, etc., Co. v. Freeburg*, 59 Minn. 230, 61 N. W. 25; *Morrison v. Arons*, 65 Minn. 321, 68 N. W. 33; *Carson Association v. Miller*, 16 Nev. 327; *Belfast Banking Co. v. Stanley, Jr.* R. 1 C. L. 693, 698. Cf. *Pittsburg Buffalo Co. v. American Fidelity Co.*, 219 Fed. 818, 135 C. C. A. 488.

<sup>13</sup> *Calvert v. London Dock Co.*, 2 Keen, 638; *General Steam Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Prairie Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. 142; *Board of Commissioners v. Branham*, 57 Fed. 179; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *Shelton v. American Surety Co.*, 127 Fed. 736, 131 Fed. 210, 66 C. C. A. 94; *Fidelity, etc., Co. v. Agnew*, 152 Fed. 855, 82 C. C. A. 103; *Justice v. Empire State Surety*

*Co.*, 218 Fed. 902, 134 C. C. A. 490; *Wells v. National Surety Co.*, 222 Fed. 8, 137 C. C. A. 546; *Equitable Surety Co. v. Tippah County*, 231 Fed. 33, 145 C. C. A. 221; *First Nat. Bank v. Fidelity, etc., Co.*, 145 Ala. 335, 40 So. 415, 5 L. R. A. (N. S.) 418, 117 Am. St. Rep. 45; *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745; *Bragg v. Shain*, 49 Cal. 131; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Chester v. Leonard*, 68 Conn. 495, 35 Atl. 397, *Gato v. Warrington*, 37 Fla. 542, 19 So. 883; *Lowndes Alliance Warehouse Co. v. Greene*, 17 Ga. App. 542, 87 S. E. 826; *Finney v. Condon*, 86 Ill. 78; *Chicago v. Agnew*, 182 Ill. App. 499; *Queal v. Stradley*, 117 Iowa, 748, 90 N. W. 588; *St. Mary's College v. Meagher*, 11 Ky. L. Rep. 112, 11 S. W. 608; *Maine Central R. Co. v. National Surety Co.*, 113 Me. 465, 94 Atl. 929, L. R. A. 1916 A. 881; *Backus v. Archer*, 109 Mich. 666, 67 N. W. 913; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Southern Real Estate Co. v.*

surety's defence, also, if the owner overpays the contractor on forged or mistaken estimates, in the honest belief in their correctness, the surety is not discharged;<sup>16</sup> and the mere permission by the creditor to the principal to perform the contract between them in a different way from that originally agreed upon, will not discharge the surety if there was no binding agreement for variation between creditor and principal, and the change permitted is not material to the surety's risk.<sup>17</sup>

Where a surety has received compensation for his undertaking, it has been held that he is discharged by such an unauthorized payment only if his contract with the creditor makes a stipulation in regard to the time of payments,<sup>18</sup> or if it can be affirmatively shown that the surety was injured.<sup>19</sup> It is hard to justify such distinctions.<sup>20</sup> The interpretation of an ambiguous contract may depend on whether the surety was compensated;<sup>21</sup> but the liability under an unambiguous one should not vary.

*Martin v. Whites*, 128 Mo. App. 117, 106 S. W. 608; *Southwestern Surety Ins. Co. v. Minnetonka Lumber Co.*, 46 Okl. 701, 148 Pac. 1038. Unless this can be shown the surety will be discharged by payment without the certificate. *Fidelity, etc., Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103; *Chester v. Leonard*, 68 Conn. 495, 509, 37 Atl. 397; *Harris v. Taylor*, 150 Mo. App. 291, 129 S. W. 995; *Kunz v. Boll*, 140 Wis. 69, 121 N. W. 601. See also *St. Johns College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994. In *Alabama Fidelity, etc., Co. v. Alabama, etc., Iron Co.*, 190 Ala. 397, 67 So. 318, the waiver by the creditor of a provision in his contract with the principal requiring the latter to make monthly statements and payments was held to discharge the surety. But where the contract provided for payments on the 15th of each month or certificates delivered on or before the 5th, variation from those dates without more will not discharge the surety. *New Haven v. National Steam Econo-*

*mizer Co.*, 79 Conn. 482, 65 Atl. 959. See also *People v. Banhagel*, 151 Mich. 40, 114 N. W. 669.

<sup>16</sup> *New Haven v. National Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959; *Chicago v. Agnew*, 264 Ill. 288, 106 N. E. 252; *Van Buren County v. American Surety Co.*, 137 Ia. 490, 115 N. W. 24, 126 Am. St. Rep. 290; *Wakefield v. American Surety Co.*, 209 Mass. 173, 95 N. E. 350.

<sup>17</sup> *George A. Fuller Co. v. Doyle*, 87 Fed. 687; *Martin v. Whites*, 128 Mo. App. 117, 106 S. W. 608.

<sup>18</sup> *Young Men's Christian Assoc. v. United States, etc., Guaranty Co.*, 90 Kan. 332, 133 Pac. 894, L. R. A. 1915 C. 170; *School District v. DeLano (United States, etc., Guaranty Co.)*, 96 Kan. 499, 152 Pac. 668.

<sup>19</sup> *Manhattan Co. v. United States Fidelity, etc., Co.*, 77 Wash. 405, 137 Pac. 1003.

<sup>20</sup> See *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745.

<sup>21</sup> See *supra*, § 625.

**§ 1244. When non-compliance with a condition on which a contract is delivered by a surety relieves him from liability.**

If the surety delivers his contract to the creditor upon a condition<sup>26</sup> or in return for a counter promise,<sup>27</sup> and the creditor fails to observe the condition or to keep his promise, he cannot hold the surety; but often the surety's contract is not delivered by him directly to the creditor, but to the principal or to a co-surety to whom some condition is stated. It is a common situation for a surety to have signed a bond or other contract, and the principal or a co-surety who was expected to join in the contract, and whose name is perhaps recited in the instrument as a party, to have failed to execute it. The signature of the principal or co-surety may be altogether lacking, or it may appear but be signed without authority.

Whether the surety is bound depends (1) upon whether he has ever made a contract, or is bound by estoppel with similar effect, and (2) if this is true, whether the circumstances are such as to render it inequitable for the creditor to enforce liability thereon. Lack of delivery may prevent the formation of a formal contract, and lack of mutual assent may prevent the formation of a simple contract. Delivery as a completed instrument is necessary for the validity of a bond; so that if a surety delivers an incomplete bond with the condition that the signature of another surety or of the principal shall thereafter be obtained, and that then, and not before, the instrument shall become valid, the delivery is merely in escrow.<sup>28</sup>

Yet in the absence of notice of the surety's intention either

<sup>26</sup> See *infra*, § 1246.

<sup>27</sup> *Fay v. Jenks*, 93 Mich. 130, 53 N. W. 163. See also *Hermitage Nat. Bank v. Carpenter*, 131 Tenn. 136, 174 S. W. 263.

<sup>28</sup> In *Horton v. Stone*, 32 R. I. 499, 80 Atl. 1, 3, the court said of such a bond: "No valid delivery of the bond was ever made, so as to make it a binding obligation upon this defendant. As shown above, it is the undisputed testimony that the defendant, when signed as surety,

at the request of Wood, did so upon the express condition that the plaintiff in replevin, Stone, should sign the bond as principal before it should become binding. The delivery of the bond upon this condition to Wood was a mere delivery in escrow, and Wood had no authority to deliver this paper to anybody until it had been signed by Stone." See also *Pawling v. United States*, 4 Cranch, 219, 2 L. Ed. 601.

### § 1245. Reasons for charging the surety.

The decisions are rested "either on the ground of estoppel or on the ground of apparent authority,"<sup>31</sup> but they are not easy to reconcile with the general principle of the common law denying validity to a sealed instrument delivered only in escrow and coming into the obligee's hands when the condition of the escrow had not been performed.<sup>32</sup> If the writing in question purported to be a non-negotiable simple contract<sup>33</sup> the difficulty of finding mutual assent is as great as that of finding a valid delivery in the case of a sealed instrument, and intrusting the creditor with an unsealed writing with a signature thereon can give no greater ground for estoppel to deny authority than if the instrument were sealed; and the circumstances on which any argument of estoppel or constructive authority is based do not seem essentially different from those which always exist where one holding a sealed instrument in escrow delivers it to an innocent obligee in violation of the condition of the escrow. Indeed, the only difference is that the person intrusted with the instrument is an interested party to it. But though the common law denied a right to trust the grantee with a deed in escrow, there is no qualification in the early books limiting the right to deliver in escrow to one interested other than as grantee. Moreover, even though the obligation is intrusted to a stranger, a surety has, nevertheless, been held liable to an obligee who subsequently takes the instrument without notice that an additional signature was contemplated.<sup>34</sup>

The results reached by the majority of decisions may be defended on grounds of practical convenience and justice. In truth, the common-law rule in regard to delivery in escrow

St. 299, 314, 48 N. E. 1100; *Fowler v. Allen*, 32 So. Car. 229, 10 S. E. 947, 7 L. R. A. 745; *Merritt v. Duncan*, 7 Heisk. 156, 19 Am. Rep. 612; *Bowman v. Van Kuren*, 29 Wis. 209, 9 Am. Rep. 554; *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621; *Cross v. Currie*, 5 Ont. App. 31.

<sup>31</sup> *Fuller v. Dupont*, 183 Mass. 598, 598, 67 N. E. 662.

<sup>32</sup> See *supra*, § 212.

<sup>33</sup> If the contract is a negotiable

bill or note there is no difficulty in fixing the surety with liability to a holder in due course.

<sup>34</sup> *Taylor County v. King*, 73 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 666; *McCormick, etc., Co. v. McKee*, 51 Mich. 426, 16 N. W. 796. But see the contrary dicta or decisions—*Millett v. Parker*, 2 Metc. (Ky.) 608; *Horton v. Stone*, 32 R. I. 499, 80 Atl. 1; *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640.

is one which offers such opportunity of defrauding persons, that the strict enforcement of it is u

Whatever difficulty may exist in theory in h surety when his delivery of the obligation was c certainly if he imposes no condition either beca concluded to waive the signature by other par names are recited in the body of the instrument, he trusts to luck or to their promises that they will can be no doubt of his liability.<sup>35</sup>

**§ 1246. If the creditor is party to the fraud, or has 1 from the form of the instrument, he cann**

If the creditor has represented to the surety th will become co-surety, and this statement is not n the surety will not be bound.<sup>36</sup> And though the crea no representation, if he had knowledge, before he credit, of representations made to the surety by the the result is the same.<sup>37</sup> The creditor's notice ma

<sup>35</sup> In *Guaranty Trust Co. v. Koehler*, 195 Fed. 669, 115 C. C. A. 475, the court said: "The true rule and the conclusion is that the failure of some of the obligors named in the body of the contract of guaranty or of suretyship to execute it, or their unauthorized execution of it, constitutes no defence to the liability of other obligors named therein who with knowledge that the former are not bound thereby execute and deliver the contract to the obligee, and thereby induce him to part with the consideration thereof." Citing *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *St. Louis Brewing Assoc. v. Hayes*, 97 Fed. 859, 38 C. C. A. 449; *United States Fidelity, etc., Co. v. Haggart*, 163 Fed. 801, 809, 91 C. C. A. 289, 297; *Empire State Surety Co. v. Carroll County*, 194 Fed. 593, 114 C. C. A. 435; *United States Fidelity Co. v. Union Trust, etc., Co.*, 142 Ala. 532, 38 So. 177; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531; *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E.

189, 192, 59 Am. Rep. *Deering v. Moore*, 86 Me 988, 41 Am. St. Rep. 1 *Johnson*, 63 Mich. 671, 3 *Woodman v. Calkins*, 13 34 Pac. 187, 40 Am. St. R *v. Bowman*, 10 Ohio, 44 *Johnson*, 31 Ohio St. 131 *v. Watson*, 54 Tex. 2 *County v. Bardon*, 79 N. W. 969." See also *Am Co. v. Pangburn*, 182 I N. E. 769, Ann. Cas. 1916

<sup>36</sup> *Rice v. Gordon*, 11 *Evans v. Bremridge*, 2 K De G. M. & G. 101; *McCowan*, [1898] 2 Ir. *Provincial Bank v. Brac T. L. R.* 797; *Jordan v. L* 547; *Deering, etc., Co.* Ind. App. 400, 45 N. E. 8 *v. Cole*, 102 Ia. 109, 71 *Selma Sav. Bank v. Hink* 200, 166 N. W. 748; *Goff* 35 Miss. 518.

<sup>37</sup> *Husak v. Clifford*, 1 100 N. E. 466; *Wharto*

structive as well as actual. Where the names of a number of obligors are recited in the instrument and the instrument is not signed by all those whose names are recited, the obligee is put upon inquiry, and if in fact the delivery was conditional on the missing signature being secured, the parties who signed conditionally are not liable.<sup>38</sup> The absence of the signature of one whose name is recited in the body of the instrument as a surety creates no presumption, however, that delivery by other sureties who signed was conditional; the condition must be proved as a fact in order to excuse them.<sup>39</sup> Where, however, the principal's signature is lacking, there is a presumption without further evidence that the surety's delivery was con-

Mut. L. Ins. Co. (Tex. Civ. App.), 156 S. W. 539; *Williams v. Hitchcock*, 86 Wash. 536, 150 Pac. 1143; *New Home Sewing Mach. Co. v. Simon*, 104 Wis. 120, 80 N. W. 71.

<sup>38</sup> *Guaranty Trust Co. of New York v. Koehler*, 195 Fed. 669, 675, 115 C. C. A. 475, citing *Smith v. United States*, 2 Wall. 219, 230, 17 L. Ed. 788; *United States v. O'Neill*, 19 Fed. 567; *Arnold v. Scharbauer*, 116 Fed. 492; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Barber v. Burrows*, 51 Cal. 473, 474; *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46; *Wagge-man v. Bracken*, 52 Ill. 468, 470; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Novak v. Pitlick*, 120 Iowa, 286, 94 N. W. 916, 98 Am. St. Rep. 360; *Fish v. Johnson*, 16 La. Ann. 29; *Wood v. Washburn*, 2 Pick. 24; *Andrews v. Etheridge*, 9 Mass. 383; *Bean v. Parker*, 17 Mass. 591, 604; *Russell v. Annable*, 109 Mass. 72, 73, 12 Am. Rep. 665; *Goodyear Dental Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; *Bjoin v. Anglim*, 97 Minn. 526, 107 N. W. 558; *School District v. Lapping*, 100 Minn. 139, 110 N. W. 849, 12 L. R. A. (N. S.) 1105; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep.

496; *Sharp v. United States*, 4 Watts, 21, 23, 28 Am. Dec. 676; *McDaniel v. Anderson*, 19 So. Car. 211; *Board of Education v. Sweeney*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767; *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614. See also *Williams v. Hitchcock*, 86 Wash. 536, 540, 150 Pac. 1143.

<sup>39</sup> *City of Los Angeles v. Mellus*, 59 Cal. 444; *Union Pacific Tea Co. v. Dick*, 89 Atl. 204 (reported without opinion in 87 Conn. 711); *Towns v. Kellett*, 11 Ga. 286; *Johnson v. Weatherwax*, 9 Kans. 75; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Gay v. Murphy*, 134 Mo. 98, 106, 34 S. W. 1091, 56 Am. St. Rep. 496; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74; *Williams v. Springs*, 7 Ired. 384; *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749. In some cases it has even been held necessary to prove that the obligee had actual notice of the condition. *Byers v. Gilmore*, 10 Col. App. 79, 50 Pac. 370; *Smith v. Board of Peoria County*, 59 Ill. 412; *Hart v. Mead Co.*, 53 Neb. 153, 73 N. W. 458. (Compare, however, *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74.)

ditional on the signature of the principal.<sup>40</sup> But in a case the circumstances may be such as to esto

<sup>40</sup> *Weir v. Mead*, 101 Cal. 125 35, Pac. 567, 40 Am. St. Rep. 46 (obligation was joint); *Wild Cat Branch v. Ball*, 45 Ind. 213; *Clements v. Cassilly*, 4 La. Ann. 380; *Goodyear Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; *Dole Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105; *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372; *Hall v. Parker*, 39 Mich. 287, 37 Mich. 590, 26 Am. Rep. 540; *Cahill's Appeal*, 48 Mich. 616, 12 N. W. 877; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751; *Safranski v. St. Paul, etc., Ry. Co.*, 72 Minn. 185, 75 N. W. 17; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496; *Board of Education v. Sweeney*, 1 S. Dak. 642, 48 N. W. 302, 36 Am. St. Rep. 767. But not a few decisions hold that it must be proved that the delivery was in fact conditional. *Cooper v. Evans*, L. R. 4 Eq. 45; *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413 (obligation was joint and several); *Hickman v. Fargo*, 1 Kas. App. 695, 42 Pac. 381; *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Bollman v. Pasewalk*, 22 Neb. 761, 36 N. W. 134; *Parker v. Bradley*, 2 Hill, 584; *Choteau v. Suydam*, 21 N. Y. 179; *Dillon v. Anderson*, 43 N. Y. 231; *Russell v. Freer*, 56 N. Y. 67; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Williams v. Marshall*, 42 Barb. 524; *O'Hanlon v. Scott*, 89 Hun, 44; *Eureka Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Douglas Co. v. Bardon*, 79 Wis. 641, 49 N. W. 969. In a few States, the surety must show not only that the delivery was conditional but actual notice on the part of the obligee of the condition. *Woodman v. Calkins*, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449; *Cockrill v. Davis*, 14 Mont. 131, 35 Pac. 958; *State v. Bowman*, 10

Ohio, 445; *Johnson v. Ohio St.* 131.

<sup>41</sup> In *Dole Bros. C. Preserving Co.*, 167 Mass. 46, 46 N. E. 105, 57 Am. St. Rep. 481, the court said: "The corporation purports to be a principal, and Latimer is its agent, and sealed by the hand of an agent. It had no authority to execute the bond, and whether the sureties are liable on the bond."

"It is well settled that the face of the paper and the signature above, without more, do not appear to be liable. The corporation is supposed to be liable on the sureties as a contract with the principal as well as on themselves. They may rely upon the right to proceed against the principal upon their own right to compel him under the instrument to pay for the bond. *Bean v. Parker*, 17 N. E. 11; *Herrick v. Johnson*, 11 N. E. 11; *Sell v. Annable*, 109 Mass. 665; *Mattoon v. Goodyear*, 151 Mass. 463, 466; *Goodyear Co. v. Bacon*, 151 Mass. 463, 466; *Goodyear Co. v. Bacon*, 24 N. E. 404, 8 L. R. A. 486. The remaining question upon the findings of fact in the case is taken out of the case as above stated. It is found that the agent knew, or had reason to know, that the agent had no authority to execute the bond on behalf of the corporation. This is enough to justify the court in refusing to rule, as matter of course, that the defendants were liable."

It has sometimes been held that if a statute or regulation under which a bond was given did not require the signature of the principal, or that if the principal being bound by law to perform certain duties, was as fully liable for his defaults as if he had signed the bond, and equally liable to indemnify his sureties, no reason forbids charging the surety on his contract, though the name of the principal was recited in the instrument.<sup>42</sup> Likewise where the bond is filed in court and is not naturally inspected by the creditors for whose benefit it is filed, this principle of constructive notice is inapplicable.<sup>43</sup>

they knew that the bond was improperly executed, when from the circumstances it would naturally be inferred that the plaintiff was relying upon it as properly signed, and binding upon both the principal and sureties, they ought to be estopped from setting up the invalidity of their promise. The judge went further and ruled, as matter of law, upon the facts found that they were liable. He did not find that they had any knowledge of the agent's want of authority, but only that they had reasonable cause to know it. If in fact they had no knowledge or belief of it, they are not culpable in their dealings with the plaintiff."

In *LaBelle Iron Works v. Quarter Savings Bank*, 74 W. Va. 569, 82 S. E. 614, 617, the court said:—"To be binding on a surety a bond of indemnity purporting to be the bond of both principal and surety must be signed by the principal, or be executed on his behalf by some one duly authorized, or the unauthorized act be subsequently ratified, or the principal be bound independently of the bond for breaches thereof, unless the surety has otherwise agreed to be bound thereby, or by his act he has estopped himself from denying his liability. *Star Grocery Co. v. Bradford*, 70 W. Va. 496, 74 S. E. 509, 39 L. R. A. (N. S.) 184; *School District v. Lapping*, 100 Minn. 139,

110 N. W. 849, 12 L. R. A. (N. S.) 1105; *Bowditch v. Harmon*, 183 Mass. 290, 67 N. E. 333; *Novak v. Pitlick*, 120 Ia. 286, 94 N. W. 916, 98 Am. St. Rep. 360; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Mitchell v. Hydraulic Building Stone Co.* (Tex. Civ. App.), 129 S. W. 148; *Wright v. Jones*, 55 Tex. Civ. App. 616, 120 S. W. 1139; *Bjoin v. Anglim*, 97 Minn. 526, 107 N. W. 558." See also *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 769.

<sup>42</sup> *United States Fidelity, etc., Co. v. Haggart*, 163 Fed. 801, 809, 91 C. C. A. 289, 297; *Empire Surety Company v. Carroll County*, 194 Fed. 593, 114 C. C. A. 435; *Adams Co. v. Nesbit*, 58 S. Dak. 6, 159 N. W. 869.

<sup>43</sup> In *Williams v. Hitchcock*, 86 Wash. 536, 150 Pac. 1143, it was held that sureties on a receiver's bond, who intrusted the bond to the receiver for the purpose of securing the signature of the wife of one of them before filing, and who failed to examine the record and repudiate their liability for failure to secure the signature, cannot be heard to say that creditors, not parties to the suit, for whose benefit the bond was given, should have examined the record so as to know that the bond was defective; and the sureties, as the one of two innocent parties who made the injury possible, must suffer the loss.

fraud or duress on the part of the principal in securing the surety's signature unless the fraud or duress is of such a character as to make totally void a writing obtained thereby.<sup>47</sup> Illustrations of cases where the surety has been held not excused may be found where the surety's signature was induced by the presence on the instrument of the signature of another party which in fact had been forged or signed without authority.<sup>48</sup> And similarly the indorser of negotiable paper is not excused by the forgery of a prior party.<sup>49</sup> So the surety is not discharged by the fact that his signature was obtained by the principal's fraudulent representations of any description,<sup>50</sup> or by his duress,<sup>51</sup> or by the fact that the principal

<sup>47</sup> As to the exceptional cases where fraud or duress renders a contract totally void, see *Carlisle, etc., Banking Co. v. Bragg*, [1911] 1 K. B. 489; *Spring Garden Ins. Co. v. Lemmon*, 117 Ia. 691, 86 N. W. 35; *Potts v. First State Bank (Okl.)*, 151 Pac. 859. Also *infra*, § 1488.

<sup>48</sup> *Veach v. Rice*, 131 U. S. 293, 318, 33 L. Ed. 163, 9 Sup. Ct. 730; *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, L. R. A. 1915, F, 1157; *Stoner v. Millikin*, 85 Ill. 218; *Stern v. People*, 102 Ill. 540; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Cook v. Boyd*, 16 B. Mon. 556; *Hall v. Smith*, 14 Bush, 604. (But see *Commonwealth v. Campbell*, 20 Ky. L. Rep. 54, 45 S. W. 89.) *York County M. F. Ins. Co. v. Brooks*, 51 Me. 506; *Chase v. Hathorn*, 61 Me. 505; *Graves v. Tucker*, 18 Miss. 9; *State v. Hewitt*, 72 Mo. 603; *Kansas City, etc., Co. v. Murphy*, 49 Neb. 674, 68 N. W. 1030; *Mosher v. Carpenter*, 13 Hun, 602; *Vass v. Riddick*, 89 N. Car. 6; *Bigelow v. Comegys*, 5 Ohio St. 256; *Loew v. Stocker*, 68 Pa. 226; *Cimini v. Zambarano*, 36 R. I. 122, 89 Atl. 295, 711; *Mitchell v. Burton*, 2 Head, 613. But see contrary decisions

(where the forged signature was that of the principal), *Dole Bros. Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297.

<sup>49</sup> 2 Ames's Cas. Bills and Notes, 169, 231, 233, note 3; *Daniel on Negotiable Instruments*, § 1357.

<sup>50</sup> *Stone v. Compton*, 5 Bing. N. C. 142; *Maitland v. Irving*, 15 Sim. 437; *Wallace v. Wilder*, 13 Fed. 707; *Marks v. First Bank*, 79 Ala. 550, 58 Am. Rep. 620; *Stiewel v. American Surety Co.*, 70 Ark. 512, 68 S. W. 1021; *A. S. Ripley Building Co. v. Coors*, 37 Colo. 78, 84 Pac. 817; *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Monroe Bank v. Anderson Co.*, 65 Iowa, 692, 22 N. W. 929; *Spring Garden Ins. Co. v. Lemmon*, 117 Iowa, 691, 86 N. W. 35; *Martin v. Campbell*, 120 Mass. 126; *Hudson v. Miles*, 185 Mass. 582, 71 N. E. 63, 102 Am. St. 370; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; *Saginaw Medicine Co. v. Batey*, 179 Mich. 651, 146 N. W. 329; *Graves v. Tucker*, 18 Miss. 9; *Linn Co. v. Farris*, 52 Mo. 75, 77, 14 Am. Rep. 389; *McWilliams v. Mason*, 31 N. Y. 294;

<sup>51</sup> *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.

rule is applicable unless there is some fact of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a representation to the surety.<sup>57</sup>

For it has been said that "both on authority and on principle, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part."<sup>58</sup> This statement does not go beyond holding the creditor for natural inferences from actual representations, though they are given a liberal construction; but to some extent at least the creditor owes a positive duty of disclosure not merely a negative duty to refrain from misrepresentation. If the creditor "knows, or has good grounds for believing that the surety is being deceived or misled, or

*v. Harbin*, 125 Ia. 174, 180, 100 N. W. 629.

<sup>57</sup> In *North British Ins. Co. v. Lloyd*, 10 Ex. 523, non-disclosure of the fact that the defendant's guaranty was taken in substitution of a previous guarantee of another which had been withdrawn, was held not to excuse the surety. So non-disclosure that the principal debtor was in poor financial condition, *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699; *Van Arsdale v. Howard*, 5 Ala. 596; *Ham v. Greve*, 34 Ind. 18; *Farmers' Bank v. Braden*, 145 Pa. 473, 22 Atl. 1045; or in default on previous indebtedness. *Hamilton v. Watson*, 12 C. &

F. 109; *Southwestern Co. v. Wynnegar*, 111 Miss. 412, 71 So. 737; *Palatine Ins. Co. v. Crittenden*, 18 Montana, 413, 45 Pac. 555; *Royal Bank v. Greenshields*, [1914] Sc. Sess. Cas. 259. Cf. *Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39. See also the following cases where non-disclosure of material facts was held not to discharge the surety. *Booth v. Storrs*, 75 Ill. 438; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Warren v. Branch*, 15 W. Va. 21. Cf. *First Nat. Bank v. Clark's Est.*, 59 Colo. 455, 149 Pac. 612.

<sup>58</sup> Per Blackburn, J., in *Lee v. Jones*, 14 C. B. (N. S.) 386.

that he was induced to enter into the contract of facts materially increasing the risks, of which he was ignorant, and he has an opportunity, before accepting, to inform him of such facts, good faith requiring demand that he should make such disclosure if he accepts the contract without doing so, and afterwards avoid it." <sup>59</sup> This principle has frequently been applied in regard to non-disclosure of present or criminal misconduct of one for whose faithfulness or performance of his duties, the surety binds himself. <sup>60</sup>

<sup>59</sup> *Bank of Monroe v. Anderson, etc.*, 65 Iowa, 692, 22 N. W. 929. See also *Owen v. Homan*, 4 H. L. C. 997, 1035; *First Nat. Bank v. Clark*, 59 Colo. 455, 149 Pac. 612; *Selma Savings Bank v. Harlan*, 167 Iowa, 673, 149 N. W. 882; *Hatfield v. Jackway*, 102 Neb. 831, 170 N. W. 181; *Damon v. Empire State Surety Co.*, 161 N. Y. App. D. 875, 146 N. Y. S. 996; *Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39; *Warren v. Branch*, 15 W. Va. 21; *Jungk v. Holbrook*, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921. See also *infra*, § 1497.

<sup>60</sup> In *Railton v. Matthews*, 10 C. & F. 934, non-disclosure of the fraudulent misconduct of an employee in a previous employment was held to excuse a surety for his fidelity, and in the following cases non-disclosure of previous fraud or embezzlement of various kinds was recognized as a valid excuse for a surety. *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72; *National Bank v. Fidelity, etc., Co.*, 89 Fed. 819, 32 C. C. A. 355; *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; *Anaheim Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048; *Wilson v. Monticello*, 85 Ind. 10; *Bank v. Anderson Mining & Ry. Co.*, 65 Iowa, 692, 22 N. W. 929; *Sherman v. Harbin*, 125 Ia. 174, 182, 100 N. W. 629; *Belleview Loan & B. Assoc. v. Jeckel*, 104 Ky. 159, 46 S. W. 482; *Franklin*

*Bank v. Cooper*, 34 Me. 542; *Charles Lawrence v. Thomas*, 84 Md. 117, 104 Me. 570; *Hudson v. Miles*, 117 N. E. 63, 102 N. E. 71; *Capital Ins. Co. v. Owen*, 101 Mo. 55, 387, 79 N. W. 60; *St. Charles Sav. (Mo.)*, 205 S. W. 387; *Jersey, 39 N. J. L. etc., Co. v. Walker*, 50 Pac. 353, 923; *E. v. Farrington*, 82 N. States Life Ins. C. Hun, 535, 36 N. Y. N. Y. 682, 51 N. E. v. Tidball, 34 Ohio Josselyn, 40 Ohio S. Commercial Bank, 5 Brewing Co. v. Rile, 46 Atl. 71; *Atlas B. 9 R. I. 168, 11 Am. mington, etc., R. Co. 116; Screwmen's Be Smith, 70 Tex. 168 Connecticut Gen. L. 72 Vt. 176, 47 Atl. 510; East Zorra v. D. Ch. 462; Peers v. O. Ch. 472. See also W. v. National Surety C. N. W. 697. The surety was discharged because of his neglect in which the discharge was with a third party.*

warranty, however, by the creditor, and if he is ignorant himself of the employee's fraud his non-disclosure of the fact will not excuse the surety though he was guilty of negligence in failing to know;<sup>61</sup> nor will the surety be excused even though the employer suspected the employee of dishonesty, and did not disclose his suspicions.<sup>62</sup> And the mere fact's that one whose fidelity is guaranteed has been negligent or inaccurate previously in the performance of his duties in ways not affecting his moral character, and these circumstances have not been disclosed to the surety though known to the creditor, will not excuse the surety.<sup>63</sup>

& *Ohio Live Stock Ins. Co. v. Bender*, 32 Ind. App. 287, 69 N. E. 691; *Capital Fire Ins. Co. v. Watson*, 76 Minn. 387, 79 N. W. 701, 77 Am. St. 657; *Ottawa Agricultural Ins. Co. v. Canada Guarantee Co.*, 30 U. Can. C. P. 360. The same principle was held applicable to a failure to disclose a prior breach of a construction contract for the performance of which the surety bound himself, in *Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39, though the ignorance of the creditor regarding the breach prevented the defence from arising in that decision. Cf. *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165, and cases cited *supra*, n. 57 *ad. fin.* An exception has been made in some cases in regard to the bonds of public officials. *State v. Rushing*, 17 Fla. 226; *State v. Dunn*, 11 La. Ann. 549; *Frownfelter v. State*, 66 Md. 80, 5 Atl. 410; *Lawder v. Lawder, Jr.* R. 7 C. L. 57; *Byrne v. Muzio*, L. R. 8 Ir. 396. And where the creditor did not himself obtain the signature of the surety, recovery was allowed in *Cawley v. People*, 95 Ill. 249; *Ætna Life Ins. Co. v. Mabbett*, 18 Wis. 667. It should be observed, however, that the principle on which recovery is denied, namely, that the non-disclosure by a creditor in view of the character of the contract proposed is itself a rep-

resentation, is applicable though the creditor did not directly induce the signature of the surety.

<sup>61</sup> *Anaheim Union Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048; *McMullen v. Winfield &c. Assoc.*, 64 Kans. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; *Tapley v. Martin*, 116 Mass. 275; *Newburyport v. Davis*, 209 Mass. 126, 95 N. E. 110; *St. Charles Sav. Bank v. Denker (Mo.)*, 205 S. W. 208; *Bowne v. Mt. Holly Bank*, 45 N. J. L. 360; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Wayne v. Commercial Bank*, 52 Pa. 343; *Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39; *Wait v. Homestead Building Assoc.*, 76 W. Va. 431, 85 S. E. 637, and see *infra*, n. 66.

<sup>62</sup> *National Provincial Bank v. Glanusk*, [1913] 3 K. B. 335; *Bank of Scotland v. Morrison*, [1911] Sc. Sess. Cas. 593.

<sup>63</sup> *Home Ins. Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; *Charles Lawrence Co. v. Buzzell (Me.)*, 104 Atl. 631; *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Screwmen's Benevolent Assoc. v. Smith*, 70 Tex. 168, 7 S. W. 793; *Peers v. Oxford*, 17 Grant Ch. 472. But see *contra*—*Smith v. Josselyn*, 40 Oh. St. 409.

surety;<sup>69</sup> nor will the creditor's mere indulgence in failing to terminate the contract because of such a breach by the principal as would justify it, excuse the surety.<sup>70</sup>

**§ 1251. The surety's right to set off a claim of the principal against the creditor.**

To an attempt by a surety to set off a cross-claim of the principal which the latter could have set up against the creditor's claim, four objections have been suggested:<sup>71</sup>

1. That the cross-right is not a mere failure of consideration, but an independent claim, and not being due to the defendant, cannot be claimed by him.

2. That the principal has a right of election whether his damages shall be claimed by recoupment or counterclaim, or reserved for a cross-action.

3. That if the surety is allowed to set up the counterclaim it must bar a future action by the principal, and that as the cross-claim might be greater than the creditor's demand, the surety, if allowed to set up the claim merely to defeat the action against him, would also destroy a right of the principal.

4. That where there are a number of sureties severally liable, if one may set a counterclaim, another ought to have the same privilege.

These reasons have generally been thought conclusive: and when the surety is sued alone he has not been allowed to use

<sup>69</sup> *Williams v. Lyman*, 88 Fed. 237, 60 U. S. App. 25, 31 C. C. A. 511; *Alabama Fidelity &c. Co. v. Alabama Fuel &c. Co.* (Ala.), 79 So. 57; *Wilkerson v. Crescent Ins. Co.*, 64 Ark. 80, 82, 40 S. W. 465; *Sherman v. Harbin*, 125 Ia. 174, 100 N. W. 629; *Charles Lawrence Co. v. Buzzell* (Me.), 104 Atl. 631; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Cumberland Assoc. v. Gibbs*, 119 Mich. 318, 78 N. W. 138; *Lancashire Ins. Co. v. Callanan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Atlantic & Pacific Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Wilmington, etc., R. Co. v. Ling*, 18 So. Car. 116; *Richmond & P. R. Co. v.*

*Kasey*, 30 Gratt. 218. The contract with the surety, however, may make notice in such a case a condition of the surety's promise. *Clydebank &c. Trustees v. Fidelity & Deposit Co.*, 53 Scotch L. R. 103.

<sup>70</sup> *Alabama Fidelity &c. Co. v. Alabama &c. Iron Co.*, 190 Ala. 397, 67 So. 318; *Young Coal Co. v. Hill*, 112 Ark. 180, 165 S. W. 292; *McKecknie v. Ward*, 58 N. Y. 41, 17 Am. Rep. 281. But it seems that after such a breach the surety might by giving notice terminate a continuing guaranty. *Emery v. Balts*, 94 N. Y. 408, 414, and see *infra*, § 1252.

<sup>71</sup> By *Selden, J.*, in *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355.



the benefit of it. Where both principal and surety are joined as defendants in the same action the right to set off the claim has generally been allowed in favor of the surety.<sup>76</sup> Even though the surety is sued alone, it seems that he should be allowed by equitable proceedings to bring the principal before the court and utilize the security of the cross-right.<sup>77</sup>

An argument not stated in the cases for discharging the surety may be suggested where the creditor subjects himself, after the creation of the suretyship contract, to a right of set-off by the principal debtor,—namely that the creditor has impaired the surety's right of subrogation.

### § 1252. Termination of surety's liability.

If a surety becomes bound for the performance of a contract and the principal fails to perform at the time, or in the manner agreed, though the delay of the creditor in enforcing his rights against the principal will not discharge the surety,<sup>78</sup> it has been held in New York at least that if this default is sufficient

<sup>76</sup> *Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542; *Waterman v. Clark*, 76 Ill. 428; *Himrod v. Baugh*, 85 Ill. 435; *Ronehel v. Lofquist*, 46 Ill. App. 442; *Slayback v. Jones*, 9 Ind. 470; *Park v. Ensign*, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352; *Reeves v. Chambers*, 67 Iowa, 81, 24 N. W. 602; *Rumley Co. v. Welcher*, 23 Ky. L. Rep. 1745, 66 S. W. 7; *Spencer v. Almoney*, 56 Md. 551; *M'Hardy v. Wadsworth*, 8 Mich. 349; *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210; *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 87, 58 N. W. 826; *Raymond v. Green*, 12 Neb. 215, 10 N. W. 709; *Concord v. Pillsbury*, 33 N. H. 310; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Loring v. Morrison*, 15 N. Y. App. D. 498, 44 N. Y. S. 526; *Wagner v. Stocking*, 22 Ohio St. 297; *Willoughby v. Ball*, 18 Okla. 535, 90 Am. St. Rep. 1017; *Hollister v. Davis*, 54 Pa. 508; *People's Bank v. Legrand*, 103 Pa. 309, 316, 49 Am. Rep. 126; *Guggenheim v. Rosenfeld*, 9 Baxt. 533; *Downer v. Dana*, 17

Vt. 518; *Wartman v. Yost*, 22 Gratt. 595; *Edmunds' Assignee v. Harper*, 31 Gratt. 637; *Baltimore Co. v. Bitner*, 15 W. Va. 455, 36 Am. Rep. 820. But see *contra*, *Joyce v. Corkrill*, 92 Fed. 838, 35 C. C. A. 38; *Noble v. Anniston Nat. Bank*, 147 Ala. 697, 41 So. 136; *Woodruff v. State*, 7 Ark. 333; *Leach v. Lambeth*, 14 Ark. 668; *Banks v. Pike*, 15 Me. 268; *Walker v. Leighton*, 11 Mass. 140; *Warren v. Wells*, 1 Met. 80; *Robbins v. Brooks*, 42 Mich. 62, 3 N. W. 256; *Paine v. Lewis*, 64 Miss. 96, 8 So. 207; *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228. Sometimes it has been held that the principal should not only be a party but be insolvent in order to justify the set-off. *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; *Willoughby v. Boll*, 18 Okla. 535, 90 Pac. 1017.

<sup>77</sup> See *Hiner v. Newton*, 30 Wis. 640.

<sup>78</sup> See *supra*, § 1231.

they may extend.<sup>81</sup> From such cases are to be distinguished those where the guarantor without any present consideration guarantees a series of future sales or credits. If no seal is attached to such a writing, it has been held, and it seems rightly, that such a promise is in effect a series of continuing offers, which will be successively accepted as each credit of the contemplated series is given. Either express revocation or death, therefore, would terminate such of these offers as had not already been accepted, and it is so generally held.<sup>82</sup> It has been suggested that the parties can provide effectively in the guaranty itself that a special notice of the guarantor's death is necessary in order to work a revocation.<sup>83</sup> But if the guarantor's prom-

<sup>81</sup> The leading case for this point is *Lloyd's v. Harper*, 16 Ch. Div. 290. There the defendant's testator signed a guaranty, promising in consideration of the admission of his son to Lloyd's as an underwriter to guarantee all his engagements in that capacity. The son was accordingly admitted, and though many years elapsed before he made any default, and though the guarantor died before such default, it was held that his estate was liable. See also *In re Crace*, *Balfour v. Crace*, [1902] 1 Ch. 733; *Aiken v. Lang's Adm.*, 106 Ky. 652, 51 S. W. 154. The law is the same in regard to sureties on an official bond. *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, 3 M. & Ry. 124 (collecting clerk); *In re Crace*, [1902] 1 Ch. 733 (agent and receiver); *Broome v. United States*, 15 How. 143 (collector), 14 L. Ed. 636; *McCluskey v. Barr*, 79 Fed. 408, 415-16; *Moore v. Wallis*, 18 Ala. 458 (guardian); *Hightower v. Moore*, 46 Ala. 387 (administrator); *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427 (insurance agent); *Voris v. State*, 47 Ind. 345 (guardian); *Mowbray v. State*, 88 Ind. 324 (City Treasurer); *Royal Ins. Co. v. Davies*, 40 Iowa, 469, 20 Am. Rep. 581 (insurance agent); *Green v. Young*, 8 Me. 14, 22 Am. Dec. 218 (deputy

sheriff); *Wood v. Leland*, 1 Met 387 (guardian); *Andrus v. Bealls*, 9. Cow. 693 (deputy sheriff); *Lawyers' Surety Co. v. Ayrault*, 165 N. Y. App. D. 254, 150 N. Y. S. 800; *White v. Commonwealth*, 39 Pa. 167 (trustee); *Shackamaxon Bank v. Yard*, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807 (cashier); *Snyder v. State*, 5 Wyo. 318, 40 Pac. 441, 63 Am. St. Rep. 60 (Clerk of Court). See also *McCluskey v. Barr*, 79 Fed. Rep. 408, 415; *Kernochan v. Murray*, 111 N. Y. 306, 309, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *cf. La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Reilly v. Dodge*, 131 N. Y. 153, 158, 29 N. E. 1011; *Ricketson v. Lizotte*, 90 Vt. 386, 98 Atl. 801. If, however, one whose fidelity is guaranteed is guilty of dishonesty the surety may terminate his liability by giving notice. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180; *Emery v. Baltz*, 94 N. Y. 408.

<sup>82</sup> *Offord v. Davies*, 12 C. B. (N. S.) 748; *White Sewing Mach. Co. v. Courtney*, 141 Calif. 674, 75 Pac. 296; *Jeudevine v. Rose*, 36 Mich. 54; *Union Central L. Ins. Co. v. Smith*, 105 Mich. 353, 63 N. W. 438; and see *supra*, § 58.

<sup>83</sup> *Coulthart v. Clementson*, 5 Q.

the contract fixes no definite time for its continuance, either by reference to a date or some anticipated event.<sup>87</sup> The right of revocation has been extended to sureties other than guarantors.<sup>88</sup> Where the guarantee is held revocable, there seems some difference of opinion whether the guarantor's death operates as an immediate revocation or whether notice of the death is requisite.<sup>89</sup>

**§ 1254. It is immaterial that the surety's obligation has been reduced to judgment.**

Even a creditor who has obtained judgment against the surety must still respect his rights, and though a release of the principal or suspension of remedy against him gave the surety no defence at law,<sup>90</sup> it is well settled in the United States that such inequitable conduct by the creditor as would discharge the surety had no judgment been rendered against him affords ground in equity for relief against the judgment; and will do so at law where equitable defences are allowed.<sup>91</sup>

steps he remains liable." And to similar effect see *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; *Kernochan v. Murray*, 111 N. Y. 306, 309, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115. See also *Hecht v. Weaver*, 34 Fed. 111.

<sup>87</sup> *Jeudevine v. Rose*, 36 Mich. 54; *Emery v. Baltz*, 94 N. Y. 408, 414; *Vidi v. United Surety Co.*, 155 N. Y. App. D. 502, 140 N. Y. S. 612.

<sup>88</sup> In *Ricketson v. Lizotte*, 90 Vt. 386, 98 Atl. 801, the court said: "The rule applicable to a continuing guaranty, that the guarantor can terminate his liability on notice to the obligee is also applicable to a continuing suretyship, in favor of the surety, though the instrument is under seal."

<sup>89</sup> In *Coulthart v. Clementson*, 5 Q. B. D. 42, the court said: "A guaranty like the present is not a mere mandate of authority revoked

*ipso facto* by the death of the guarantor." And this view was taken in *Gay v. Ward*, 67 Conn. 147, 156. See also *Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191, 65 Pac. 381, but in Massachusetts death without notice is effective. *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383.

<sup>90</sup> *Pole v. Ford*, 2 Chitty, 125; *Bray v. Manson*, 8 M. & W. 668; *La Farge v. Herter*, 3 Denio, 157.

<sup>91</sup> *In re McDonald*, 14 N. B. R. 477; *Carpenter v. Devon*, 6 Ala. 718; *Dampskibeaktieselskabet Habil v. United States, etc., Co.*, 142 Ala. 363, 367, 39 So. 54; *Morley v. Dickinson*, 12 Cal. 561; *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427; *Trotter v. Strong*, 63 Ill. 272; *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53; *Graff v. Fox*, 204 Ill. App. 598; *Gipson v. Ogden*, 100 Ind. 20; *Sherraden v. Parker*, 24 Iowa, 28; *Gustine v. Union Bank*, 10 Rob. (La.) 412; *Carpenter*

surety by the terms of his promise has agreed to perform if the principal fails to make the stated payment or performance, however valid the reason for his failure; and, therefore, the surety's defence, if he has any, must be based on equitable grounds. But if the surety merely promises to answer for the principal's debts or defaults, a judgment in the principal's favor at the suit of the creditor conclusively shows that as between them there has been no debt or default, and the surety by the very terms of his promise can be under no liability, unless indeed the judgment was based on a personal discharge founded on bankruptcy or the statute of limitations or the like.<sup>66</sup>

Where the surety by the terms of his promise is liable, but the creditor has previously suffered an adverse judgment in an action against the principal, it has been said: "It is obvious that if the rule of *res inter alios acta* is applied to a case in which the principal has been discharged, there may be a judgment against a surety who will either have no indemnity against his principal, or if he has, then the principal will be indirectly subjected to a liability from which he had been legally discharged."<sup>67</sup> The solution of the difficulty is this. If the reason why judgment went against the creditor was due to the infancy, coverture, or discharge in bankruptcy of the principal, or to any other circumstances which actually existed and for which the creditor was not to blame, the surety has no equitable defence; but if in the later litigation with the surety, it is found as a fact that the principal was not an infant, a married woman, or discharged in bankruptcy, or did not have on the actual facts a defence to the action against him, the creditor must be deemed in fault for having suffered judgment to go against him, and

<sup>66</sup> *State v. Parker*, 72 Ala. 181; *Brown v. Bradford*, 30 Ga. 927; *Price v. Carlton*, 121 Ga. 12, 24, 48 S. E. 721, 68 L. R. A. 736; *Cook v. King*, 7 Ill. App. 549; *Baker v. Merriam*, 97 Ind. 539; *Stevens v. Carroll*, 131 Ia. 170, 105 N. W. 653; *Crum v. Wilson*, 61 Miss. 233; *State v. Coste*, 36 Mo. 437; *People v. Metropolitan Surety Co.*, 171

N. Y. App. Div. 15, 156 N. Y. S. 1027; *Gill v. Morris*, 11 Heisk. 614, 27 Am. Rep. 744; *Sonnenthiel v. Trust Co.*, 23 Tex. Civ. App. 436, 56 S. W. 143. Most of these cases were suits on official bonds.

<sup>67</sup> *Gill v. Morris*, 11 Heisk. 614, 621, 27 Am. Rep. 744.

admissible evidence of the facts litigated, since they were established in an action to which the surety was not a party; and many authorities sustain this view.<sup>1</sup> By the weight of authority in the United States, however, the judgment against the principal is *prima facie* evidence in an action against the surety that the principal was rightly held liable, and that, therefore, the surety is bound to answer for the principal's default;<sup>2</sup> and in a few States the judgment against the principal has even been held conclusive against the surety.<sup>3</sup>

*Cal*  
<sup>1</sup> King v. Norman, 4 C. B. 884; *Ex parte* Young, 17 Ch. D. 668; Lucas v. Governor, 6 Ala. 826; Fireman's Co. v. McMillan, 29 Ala. 147; Arrington v. Porter, 47 Ala. 714; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Governor v. Shelby, 2 Blackf. 26; McConnell v. Poor, 113 Ia. 133, 84 N. W. 968, 52 L. R. A. 312; Lartigue v. Baldwin, 5 Martin (La.), 193; Bailey v. Butterfield, 14 Me. 112; Rodini v. Lytle, 17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165; DeGreiff v. Wilson, 30 N. J. Eq. 435; Moss v. McCullough, 5 Hill, 131; Berry v. Schaad, 50 N. Y. App. Div. 132, 63 N. Y. S. 349; Miano v. Empire State Surety Co., 153 N. Y. App. D. 423, 138 N. Y. S. 475; McKellar v. Bowell, 4 Hawks, 34; Giltinan v. Strong, 64 Pa. 242; State v. Cason, 11 S. Car. 392; Ballantine v. Fenn, 84 Vt. 117, 78 Atl. 713, 40 L. R. A. (N. S.) 698.

<sup>2</sup> Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Moses v. United States, 166 U. S. 571, 41 L. Ed. 1119, 17 Sup. Ct. 682; Equitable Surety Co. v. Board, 256 Fed. 773; State v. Martin, 20 Ark. 629; Price v. Carlton, 121 Ga. 12, 48 S. E. 721; 68 L. R. A. 736; Charles v. Haskins, 14 Ia. 471, 83 Am. Dec. 378; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kans. 439; Topeka v. Ritchie, 102 Kan. 384, 170 Pac. 1003; Heath v. Shrempp, 22 La. Ann. 167; Macready v. Schenck,

41 La. Ann. 456, 6 So. 517; Dane v. Gilmore, 51 Me. 544; McPharlin v. Fidelity, etc., Co., 162 Mich. 141, 127 N. W. 307 (if the surety had notice of the proceeding); Beauchaine v. McKinnon, 55 Minn. 318, 56 N. W. 1065 (see also Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910); Iglehart v. Mackubin, 2 Gill & J. 235 (overruling Beall v. Beck, 3 Har. & McH. 342); Leppert v. Flaggs, 101 Md. 71, 60 Atl. 450; Baltimore, etc., R. Co. v. Howard County, 111 Md. 176, 73 Atl. 656, 40 L. R. A. (N. S.) 1172; Lowell v. Parker, 10 Met. 309, 43 Am. Dec. 436; People v. Mersereau, 74 Mich. 687, 42 N. W. 153; Hursey v. Marty, 61 Minn. 430, 63 N. W. 1090; Calhoun v. Gray, 150 Mo. App. 591, 131 S. W. 478; Commissioners v. Butt, 2 Oh. 348; State v. Jennings, 14 Oh. St. 73; Perry v. Merrill (Okl.), 179 Pac. 28; Connor v. Corson, 13 S. Dak. 550, 618, 83 N. W. 588, 84 N. W. 191; Atkins v. Baily, 9 Yerg. 111; Barksdale v. Butler, 6 Lea, 450; Carr v. Meade, 77 Va. 142; Stephens v. Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793. Many cases on the general topic are collected in a note in 40 L. R. A. (N. S.) 698.

<sup>3</sup> Tracy v. Goodwin, 5 Allen, 409; Dennie v. Smith, 129 Mass. 143; Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399; Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206; McMicken v. Common-

mistake, the creditor is given the same equitable relief as if the surety were a principal.<sup>7</sup> Equity will not, however, relieve against the rule of survivorship in joint obligations where a deceased obligor was a surety.<sup>8</sup>

**§ 1258. Injurious action by the creditor will discharge a surety, though the creditor when the obligation was created was ignorant of the suretyship relation.**

When two or more persons apparently bound as principal debtors arrange, either at the time when the debt was contracted or subsequently, that, *inter se*, one of them shall be liable only as a surety, the creditor after he has had notice of the arrangement must do nothing to prejudice the interests of the surety by any such dealing with his co-debtors, or with securities as would have been fatal had the suretyship relation existed when the debt was created, and the creditor had known of it.<sup>9</sup> This rule undoubtedly allows matter

*Berg v. Radcliff*, 6 Johns. Ch. 302, 307; *Harrison v. Field*, 2 Wash. (Va.) 155; *Kerney v. Kerney*, 6 Leigh, 478.

<sup>7</sup> *Crosby v. Middleton*, Prec. Ch. 309; *United States v. Cushman*, 2 Sumn. 434; *Percival v. McCoy*, 13 Fed. 379; *Olmsted v. Olmsted*, 38 Conn. 309; *Edwards v. Schoeneman*, 104 Ill. 278; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359 (overruling *Trustees v. Otis*, 85 Ill. 179); *Stevens v. Pendleton*, 105 Mich. 519, 63 N. W. 655; *State v. Frank*, 51 Mo. 98; *Berge v. Radcliff*, 6 Johns. Ch. 303, 308; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. 181; *Sikes v. Truitt*, 4 Jones Eq. 361; *Neininger v. State*, 50 Oh. St. 394, 34 N. E. 633; *Moser v. Libenguth*, 2 Rawle, 428; *Weaver v. Shryock*, 6 S. & R. 262, 264; *Rutland v. Paige*, 24 Vt. 181. So where the creditor took in renewal of a note signed by principal and surety a note signed by the principal on which he had forged the surety's name, the creditor was allowed recovery against the sure-

ty on the original note though it had been cancelled. *Severy State Bank v. Hoyt*, 103 Kans. 44, 172 Pac. 994. In *Citizens' Trust & Co. v. Goff*, 81 W. Va. 366, 94 S. E. 756, the creditor was denied relief on account of laches.

<sup>8</sup> *Supra*, § 344.

<sup>9</sup> Lord Watson in *Rouse v. Bradford Banking Co.*, [1894] A. C. 586. To the same effect see—*Oakeley v. Pasheller*, 4 Cl. & F. 207, 10 Bligh, N. S. 548, s. c; *Oakford v. European & American S. S. Co.*, 1 H. & M. 182; *Overend Gurney & Co., Ltd., v. Oriental Financial Corp., Ltd.*, L. R. 7 H. L. 348, 360; *Wilson v. Lloyd*, 16 Eq. 60; *Vary v. Norton*, 6 Fed. 808; *Home Bank v. Waterman*, 134 Ill. 461, 467, 29 N. E. 503; *McTaggart v. Dolan*, 86 Ind. 314; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529; *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. 610; *Patterson v. Camden*, 25 Mo. 13; *Millerd v. Thorn*, 56 N. Y. 402; *Palmer v. Purdy*, 83 N. Y. 144; *Hall v. Johnston*, 6 Tex. Civ. App. 110, 24 S. W. 861; *Gates v. Hughes*, 44 Wis.

he became such was discharged by any inequitable dealing on the part of the holder with the acceptor or maker who as between himself and his co-debtor was the principal.<sup>12</sup> So

<sup>12</sup> The following excellent summary of authorities is from Professor Henning's article in 59 *University of Pennsylvania Law Review*, 532. Joint acceptors or makers were discharged in *Liquidation of Overend & Co. v. Liquidators of Oriental, etc., Co.*, L. R. 7 H. L. 348; *Taylor v. Burgess*, 5 H. & N. 1; *Pooley v. Harradine*, 7 El. & Bl. 431; *Hall v. Wilcox*, 1 Mood. & Rob. 58; *Vary v. Norton*, 6 Fed. 808 (extension of time); *Scott v. Scruggs*, 60 Fed. 721, 9 C. C. A. 246; *Bruce v. Edwards*, 1 Stew. (Ala.) 11, 18 Am. Dec. 33 (notice to sue under statute); *Branch Bank, etc., v. Darrington*, 9 Ala. 949; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17 (extension of time); *Byers v. Hussey*, 4 Col. 515 (semble); *Drescher v. Fulham*, 11 Col. App. 62, 52 Pac. 685 (extension of time); *Fraser v. McConnell*, 23 Ga. 368 (notice to sue under statute); *Mathewson v. Jones*, 30 Ga. 306, 76 Am. Dec. 647 (fraud as to collateral fact known to plaintiff indorsee); *Perry v. Hodnett*, 38 Ga. 103 (extension of time); *McCarter v. Turner*, 49 Ga. 309 (failure to sue under statute); *Stewart's Adm. v. Parker*, 55 Ga. 656 (extension of time); *Flynn v. Mudd*, 27 Ill. 323; *Ward v. Stout*, 32 Ill. 399 (obiter); *Voss v. German-American Bank*, 83 Ill. 599 (obiter), 25 Am. Rep. 415; *Trustees, etc., v. Southard*, 31 Ill. App. 359 (semble); *Core v. Wilson*, 40 Ind. 204 (joint maker entitled to statutory privilege as to execution); *Hamilton v. Winterrowd*, 43 Ind. 393; *Holland v. Johnson*, 51 Ind. 346 (extension of time and surrender of collateral); *Buck v. Smiley*, 64 Ind. 431 (extension of time); *Sample v. Cochran*, 84 Ind. 594 (surrender of collateral); *Kelly v. Gillespie*, 12 Ia. 55, 79 Am. Dec. 516; *Corielle v. Allen*, 13 Ia. 289 (extension of time); Cham-

bers *v. Cochran*, 18 Ia. 159; *Piper v. Newcomer*, 25 Ia. 221; *Kirby v. Landis*, 54 Ia. 150, 6 N. W. 173; *Wendling v. Taylor*, 57 Ia. 354, 10 N. W. 675 (extension of time); *Lambert v. Shitler*, 62 Ia. 72, 17 N. W. 187, s. c. 71 Ia. 463, 32 N. W. 424 (discharge of attachment); *Ross v. Madden*, 1 Kans. 445; *Rose v. Williams*, 5 Kans. 483 (extension of time); *Roberson v. Blevins*, 57 Kans. 50, 45 Pac. 63 (extension of time); *Neel v. Harding*, 2 Met. (Ky.) 247; *Weller v. Ralston*, 28 Ky. L. Rep. 572, 89 S. W. 698; *Adle v. Metoyer*, 1 La. Ann. 254; *Jones v. Fleming*, 15 La. Ann. 522; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673 (extension of time); *Springer v. Toothaker*, 43 Me. 381, 69 Am. Dec. 66 (abandonment of lien of execution); *Cummings v. Little*, 45 Me. 183 (by surrender of collateral); *Horne v. Bodwell*, 5 Gray, 457 (extension of time); *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254 (statement of creditor that he will look to principal only); *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378; *Barron v. Cady*, 40 Mich. 259 (extension of time); *Fuller v. Quesnel*, 63 Minn. 302, 65 N. W. 634; *Kaufman v. Barbour*, 98 Minn. 158, 107 N. W. 1128; *Smith v. Clopton*, 48 Miss. 66; *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *Coats v. Swindle*, 55 Mo. 31; *German, etc., Ass'n v. Helmrick*, 57 Mo. 100; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517 (extension of time); *O'Howell v. Kirk*, 41 Mo. App. 523 (notice to sue under statute); *Lee v. Brugmann*, 37 Neb. 232, 55 N. W. 1053 (extension of time); *Wheat v. Kendall*, 6 N. H. 504; *Merrimack County Bank v. Brown*, 12 N. H. 320; *Rochester Savings Bank v. Chick*, 64 N. H. 410; *Draper v. Trescott*, 29 Barb. 401; *Billington v. Wagoner*, 33

it might be shown by parol that the drawer or indorser of negotiable paper was the principal debtor, and the acceptor or maker was discharged by extension of time or other inequitable dealing with the drawer or indorser, if the holder knew when he became such of the suretyship relation.<sup>14</sup>

N. Y. 31; Hubbard v. Gurney, 64 N. Y. 457; Welfare v. Thompson, 83 No. Car. 276 (local statute of limitations applicable to sureties is shorter than that applicable to other debtors. Short period held controlling); Osborn v. Low, 40 Oh. St. 347 (extension of time); McComb v. Kittridge, 14 Ohio, 348 (extension of time); Holt v. Bodey, 18 Pa. 207; Diffenbacher's Estate, 31 Pa. Sup. 35; Zapalac v. Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938; Kempner v. Patrick, 43 Tex. 216, 95 S. W. 51; Turrill v. Boynton, 23 Vt. 142 (joint maker of note discharged by extension to other joint maker); Harmon v. Hale, 1 Wash. Ter. 422 (false information by creditor as to payment); Glenn v. Morgan, 23 W. Va. 467 (admitting defence good at law except in specialty contracts, but deciding specialty contracts not dischargeable by parol at law); Riley v. Gregg, 16 Wis. 686; Irvine v. Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; Moulton v. Posten, 52 Wis. 169, 8 N. W. 621. Contrary decisions are: Kritzer v. Mills, 9 Cal. 21; California, etc., Bank v. Ginty, 108 Cal. 148, 41 Pac. 38 (practically overruling Capital Savings Bank v. Reel, 62 Cal. 419); Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283 (denying the defence at law, but by dictum admitting relief to be in equity); Anthony v. Fritta, 45 N. J. L. 1 (held that the defence is inadmissible in a court of law but a ground of equitable relief). See Westervelt v. Frech, 33 N. J. Eq. 451.

<sup>14</sup> Professor Hening summarizes the cases as follows: Laxton v. Peat, 2 Camp. 185; Davies v. Stainbank, 6 De G. M. & G. 679 (accommodation

acceptor discharged by extension); Daggett v. Whiting, 35 Conn. 566, (maker of check held surety without recourse to him); Hall v. Capital Bank, 71 Ga. 715; Lacy v. Lofton, 26 Ind. 324 (statutory duty of creditor when so ordered to levy and exhaust principal's property, practically overruling Lambert v. Sandford, 2 Black. 137, 18 Am. Dec. 149); Morehead v. Citizens' Bank, 130 Ky. 414, 113 S. W. 501, 23 L. R. A. (N. S.) 141 (extension of time, practically overruling Anderson v. Anderson, 4 Dana, 352); Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Jennings v. Moore, 189 Mass. 197, 75 N. E. 214 (maker treated in equity as surety for anomalous indorser to payee and discharged *pro tanto* by loss of securities); Canadian Bank, etc., v. Coumbe, 47 Mich. 358, 11 N. W. 196 (accommodation acceptor discharged by extension of time to drawer); Meggett v. Baum, 57 Miss. 22 (accommodation acceptor); Boatmen's Savings Bank v. Johnson, 24 Mo. App. 316; St. Joseph F. & M. Ins. Co. v. Hauck, 71 Mo. 465; Hoffman v. Habighorst, 38 Or. 261, 63 Pac. 610, 53 L. R. A. 906 (maker of note surety for third person not a party to the paper); Marsh v. Consolidation Bank, 48 Pa. 510 (maker of note surety for indorsee). Contrary decisions are: Wilson v. Isbell, 45 Ala. 142; Bank v. Walker, 9 S. & R. 229, 11 Am. Dec. 709; Walker v. Bank of Montgomery, 12 S. & R. 382 (time given to the accommodated indorser held to be no discharge to the accommodating maker by the holder, who subsequently learned of

The law was less certain where the holder took the instrument in ignorance of the suretyship relation, but became aware of it before the dealings in question with the principal debtor. Here too, however, the weight of authority supported the view that the surety, though primarily liable by the terms of the instrument, would be discharged by inequitable dealing with the party who, though secondarily liable on the instrument, was in fact the principal debtor.<sup>15</sup>

### § 1260. Effect of the Negotiable Instruments Law.

To what extent the principles stated in the preceding section remain applicable under the Negotiable Instruments Law is uncertain. The language of the statute is not clear.<sup>16</sup> And by a somewhat doubtful construction the courts generally have held that an accommodation maker is not released by an extension of time to a co-maker or an indorser who is in fact the principal debtor, and known by the holder to be such.<sup>17</sup> Whether inequitable dealing with collateral,

the suretyship); *White v. Hopkins*, 3 W. & S. 99, 37 Am. Dec. 542; *Stephens v. Bank*, 88 Pa. St. 157, 32 Am. Rep. 438; *Fourth Nat. Bank v. Frasier*, 9 Phil. 213; *Delaware, etc., Co. v. Haser*, 199 Pa. 17, 48 Atl. 694, but in *Holt v. Bodey*, 18 Pa. 207, one joint obligor of a bond was permitted to prove his suretyship by parol and obtained a discharge by showing the release of security by the creditor.

<sup>15</sup> Professor Henning thus summarizes the decisions: *Ewin v. Lancaster*, 6 B. & Sm. 571 (accommodation acceptor discharged by time given by holder to the accommodated drawer; knowledge existed only at time of extension; *Crompton, J.*, said: "that is the time to be looked at, because it is the time when the equity arises"); *Laxton v. Peat*, 2 Camp. 185; *Bailey v. Edwards*, 4 B. & S. 761 (accommodation acceptor surety for indorser); *Lauman v. Nichols*, 15 Iowa, 161 (joint maker discharged by extension of time); *Fullee v. Quesnel*, 63 Minn. 302, 65

N. W. 634; *Smith v. Clopton*, 48 Miss. 66; *Valley Nat. Bank v. Meyers*, 17 Nat. Bank. Rep. 257 (D. C. E. Dist. of Mo.) (maker of note surety for indorser discharged by extension of time); *Wheat v. Kendall*, 6 N. H. 504; *Westervelt v. Frech*, 33 N. J. Eq. 451 (maker of note surety to payee for indorser discharged by extension of time). Contrary decisions are: *Diversy v. Moor*, 22 Ill. 330, 74 Am. Dec. 157 (accommodation acceptor not discharged by statutory notice to sue drawer); *Gano v. Heath*, 36 Mich. 441 (joint makers); *Heath v. Derry Bank*, 44 N. H. 174 (the note reading "all as principals promise to pay"); *Hoge v. Lansing*, 35 N. Y. 136 (maker accommodating the payee); *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200 (*obiter* acceptor in fact not for accommodation).

<sup>16</sup> Sections 119 and 120 are the sections especially involved. See *supra*, §§ 1189, 1190.

<sup>17</sup> *Cowan v. Ramsey*, 15 Ariz. 533,

or other defences open to a surety in the same way as extension of time. The distinction seems apparent from

**§ 1261. When accommodation parties are co-sureties.**

Frequently more than one party signs for accommodation, and the question whether these accommodation parties are the accommodated parties or accommodation parties is, as to each, whether he is primarily liable. That is, whether he is liable with him or sureties for him. A surety may assume a primary liability for another, and when one accommodation party is a primary party, as maker, or as indorser or drawer, it has been held that this is shown.<sup>19</sup> There is no

536, 140 Pac. 501; *Vanderford v. Farmers' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514; *Night & Day Bank v. Rosenbaum*, 191 Mo. App. 559, 177 S. W. 693; *National Citizens' Bank v. Toplitz*, 81 N. Y. App. Div. 593, 81 N. Y. S. 422 (affd. 178 N. Y. 464, 71 N. E. 1); *First Nat. Bank v. Meyer*, 30 N. Dak. 388, 152 N. W. 657; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99; *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Bradley Engineering, etc. Co., v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127. See also *Witts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882. But see *contra*:—*Goldberg v. Stone*, 10 Ala. App. 485, 65 So. 454; *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50. In *Night & Day Bank v. Rosen-*

accommodation parties are indorsers. The form of the instrument then does not always, though it does sometimes, give any indication whether one obligation was to precede the other. Several cases may be supposed.

If a note is made payable to A and B, and indorsed by them for the accommodation of the maker, they are clearly not successive indorsers, but joint indorsers.<sup>20</sup> On the other hand, where a note is payable to A, and indorsed by A and then by B, it is apparent from the terms of the instrument that the indorsements must be regarded as successive, and that by the terms of the instrument A is bound to indemnify B. If the note is payable to A and indorsed by A, B, and C, A, according to the form of the instrument, is the primary obligor as compared with B and C, but it is as consistent with the form of the instrument that B and C are joint indorsers as that they are successive indorsers. The cases thus far supposed have been cases of two regular indorsements as distinguished from anomalous indorsements by one never even in form a holder of the instrument. Such indorsements are now, under the Negotiable Instruments Law, treated as imposing the obligation of an indorser.<sup>21</sup> Where two or more, therefore, indorse anomalously for accommodation, they are indorsers, but whether joint or successive is not in any way indicated by the form of the document. Prior to the passage of the Negotiable Instruments Law, some States held that all anomalous indorsers were co-makers; and if they signed for accommodation, were co-sureties, since one co-maker so far as the instrument indicates stands on a parity with others.<sup>22</sup>

**§ 1262. Liability of accommodation indorsers on negotiable instruments is presumably successive.**

It will be seen, therefore, that whether two accommoda-

393; *Heintzelman v. L'Amoroux*, 3 Nev. 377; *Laubach v. Pursell*, 35 N. J. 434; *Gomez v. Lazarus*, 1 Dev. Eq. 205; *Dawson v. Pettway*, 4 Dev. & B. 396; *Williams v. Bosson*, 11 Oh. 62; *Barnet v. Young*, 29 Oh. St. 7, 12.

<sup>20</sup> Such a case is *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853.

<sup>21</sup> Negotiable Instruments Law, § 64.

<sup>22</sup> See, e. g., *Keyser v. Warfield*, 100 Md. 72, 59 Atl. 189.

tion indorsers appear from the instrument to be jointly liable instead of jointly liable depends upon the order in which they indorse. For this reason those who indorse for pay less attention probably to the order in which their names appear than those who sign for pay. Those who sign respectively as maker and indorser. That the order of proof may be by the Negotiable Instruments Act on a prior signer who asserts that he is a co-signer, subsequent signor,<sup>24</sup> the burden should be satisfied by the presence of evidence of a contrary intention by the two had agreed to become sureties for the first. The fact that one signed as maker, and the other as indorser is doubtless evidence of a contrary intention where the second indorser signs a note without previous arrangement, and the note has already been signed by the first indorser. Under the circumstances the second indorser certainly has no right to assume the liability of surety for the first indorser, but rather than that of surety with him, and he must have intended the smaller obligation.<sup>25a</sup> But

<sup>23</sup> The Negotiable Instruments Law undoubtedly states, Section 68, that "indorsers are liable *prima facie*, in the order in which they indorse." But this has no specific reference to co-sureties, and certainly does not mean that where parties intend a joint liability this intention will not be given effect, even though for convenience one may sign before the other; and it is only by extrinsic circumstances not by the form of the instrument that it is possible to tell in many cases whether the indorsement is joint or several.

<sup>24</sup> Porter v. Huie, 94 Ark. 333, 126 S. W. 1069, 28 L. R. A. (N. S.) 1039. See also M'Donald v. Magruder, 3 Pet. 470, 7 L. Ed. 744.

<sup>25</sup> See cases cited *supra*, note 19.

<sup>25a</sup> Wescott v. Stevens, 85 Me. 325, 329, 27 Atl. 146. "If the maker presented the note, already indorsed by the payee, to the plaintiff, with a request to become a party to the note,

he had the choice of becoming bound. He chose to sign as maker. In effect, he handed the note to the plaintiff and took the note as a result of his contract. It is plain that he intended, to look to the plaintiff when he indorsed the note otherwise he would have indorsed in a different capacity. If he did, he accommodated the same, gave credit, and looked to the plaintiff. He became bound as maker. It was the contract made by the order of indorsement shown to be different from what appear to be. Such a writing was what the written contract was.

"Coolidge v. Wightman, 100 Me. 1, 65 Atl. 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

quite different where the indorsement of both parties was part of an arrangement in which both shared but one indorsed before the other. Yet even in such a case the weight of authority holds the first indorser bound to indemnify the second.<sup>28</sup> It has even been held that the fact that in succes-

dorsed the maker's note for his accommodation, and, in the absence of an agreement between them to be sureties merely, they were held bound to each other as successive indorsers. There, the indorsements were both at the request of the maker. Here, if plaintiff's indorsement was at the request of the maker, without any agreement with defendant, whose name was already on the note, *a fortiori* the defendant should be held to a completed contract, on which plaintiff paid his money."

See also to the same effect *McCarty v. Roots*, 21 How. 432, 16 L. Ed. 162; *Kirschner v. Conklin*, 40 Conn. 77; *Hamilton v. Johnston*, 82 Ill. 39; *Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665; *Coolidge v. Wiggin*, 62 Me. 568; *Rhinehart v. Schall*, 69 Md. 352, 16 Atl. 126; *Shaw v. Knox*, 98 Mass. 214; *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. 308; *Harrah v. Doherty*, 111 Mich. 175, 69 N. W. 242; *Smith v. Smith*, 1 Dev. Eq. 173; *Pitkin v. Flannagan*, 23 Vt. 160, 56 Am. Dec. 61; *Hogue v. Davis*, 8 Gratt. 4.

But in *Stovall v. Border Grange Bank*, 78 Va. 188, the court said: "It is of no consequence in this case whether Stovall knew that Lee had signed it or not, for where successive endorsers all endorse for accommodation of the maker, though at different times and without communication or mutual understanding, they are in equity co-sureties and subject to common contribution."

<sup>28</sup> In the following cases, so far as appears, the second indorser's signa-

ture was not induced by the supposed liability of a previous indorser. The court apparently did not consider this a material circumstance. The fact that one indorsement preceded the other in position (and presumably in time though only a very short time), being regarded as controlling. *Moody v. Findley*, 43 Ala. 167; *Pomeroy v. Clark*, 1 MacArth. 606; *Scott v. Doneghy*, 17 B. Mon. 321; *Gasquet v. Oakey*, 15 La. 537; *Woodward v. Severance*, 7 Allen, 340; *Johnson v. Crane*, 16 N. H. 68; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Bradford v. Corey*, 5 Barb. 461; *Wolf v. Hostetter*, 182 Pa. 292, 37 Atl. 988; *Crompton v. Spencer*, 20 R. I. 330, 38 Atl. 1002; *Marr v. Johnson*, 9 Yerg. 1; *Farmers' Bank v. Vanmeter*, 4 Rand. 553, 563; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515.

In the following cases it appears affirmatively that the indorsements were approximately simultaneous, or that the second indorsement was before that of the payee; or that the first signed subject to an agreement that the second also should sign, and the second was aware of the agreement, yet the liability of the indorsers was held to be successive. *Moore v. Cushing*, 162 Mass. 594, 39 N. E. 177, 44 Am. St. Rep. 393; *Bacon v. Burnham*, 37 N. Y. 614, 616; *Cogswell v. Hayden*, 5 Oreg. 22; *Aiken v. Barkley*, 2 Speer L. 747, 42 Am. Dec. 397.

But in *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223, A, being in financial straits, made a note to his own order, signed by his firm as makers and indorsed by him, and procured three of his friends to indorse the same with him

better view is that an agreement to become accommodation indorsers for another, in the absence of other circumstances, of itself implies an agreement to share the loss equally.<sup>31</sup>

**§ 1263. Release or inequitable dealing with one co-surety partially discharges others.**

Each of several co-sureties is in legal effect as against the others a principal for his proportion of the debt and a surety as to the rest, and a release of one is therefore a release of one who is in part a principal. The same is true where several co-debtors are all principals. In both cases as to part of the debt as between one another each is a principal and as to part he is a surety. If the law of suretyship is logically followed, releasing or giving time to one co-surety or to one of several principal debtors, will discharge the others in respect to the portion of the debt as to which the party released or given time to is a principal. As has been previously seen,<sup>32</sup> the law of co-debtors is old, that of principal and surety is modern, and the old law that a co-debtor who is a principal as to part is not discharged by giving time to a co-principal still persists;<sup>33</sup> although if they are bound jointly or jointly and severally a release or any absolute discharge of one discharges the others.<sup>34</sup> But in the case of co-sureties, the equitable principles of suretyship are observed, and accordingly each must be treated as between himself and his co-

tract in so many words to sign as co-sureties. It was sufficient if it appeared, taking all the circumstances into account, that that was the nature of the liability which as between themselves the parties intended to assume and did assume. *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Mulcare v. Welch*, 160 Mass. 58, 35 N. E. 97; *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223; *Macdonald v. Whitfield*, 8 App. Cas. 733."

<sup>31</sup> *Whitehouse v. Hanson*, 42 N. H. 9; *Love v. Wall*, 1 Hawks, 313; *Daniel v. McRae*, 2 Hawks, 590, 11 Am. Dec. 787; *Richards v. Sims*, 1 Dev. & B.

48; *Douglass v. Waddle*, 1 Oh. 413, 422, 13 Am. Dec. 630; *Marquardt's Est.*, 251 Pa. 73, 95 Atl. 917; *United States Bank v. Beirne*, 1 Gratt. 234, 269, 42 Am. Dec. 551.

<sup>32</sup> *Supra*, § 339.

<sup>33</sup> Nor can a co-principal who has paid the portion of the obligation, which, as between himself and the other co-principals, he should pay demand that the creditor shall thereafter treat him as a surety. *Fitzgerald v. Nolan*, 102 Iowa, 283, 71 N. W. 224; *Jump v. Johnson*, 12 Ky. L. Rep. 100, 135 S. W. 343. But see *supra*, § 1258.

<sup>34</sup> See *supra*, §§ 333, 334.

The problem is somewhat complicated by the uncertainty which may exist as to the extent of a co-surety's right of contribution against another co-surety. Where there are a number of co-sureties, the ultimate amount which one who has paid more than his share can recover from another co-surety, depends on whether the co-sureties are solvent.<sup>40</sup> The extent, therefore, to which an injured co-surety is discharged from liability to the creditor will depend on whether all the co-sureties are solvent, since a discharge of a solvent co-surety injures another co-surety in proportion to the number of solvent co-sureties who still remain liable.<sup>41</sup>

A creditor who discharges one co-surety either in full or in part, may reserve his right against a co-surety either for the entire claim,<sup>42</sup> or for the portion equitably due from such co-surety.<sup>43</sup> And where a co-surety, jointly liable with others, has been released only as to his proportion of the debt, courts seek to construe the agreement as reserving the creditor's right as against other co-sureties for their proportion.<sup>44</sup>

575; *Dunn v. Slee*, 1 Moore, 2 Holt N. P. 399; *Gosserand v. Lacour*, 8 La. Ann. 75; *Ide v. Churchill*, 14 Ohio St. 372. But see *Greenwood v. Francis*, [1899] 1 Q. B. 312.

<sup>40</sup> See *infra*, §§ 1271, 1277.

<sup>41</sup> *Dodd v. Winn*, 27 Mo. 501; *Wetmore & Morse Granite Co. v. Ryle* (Vt. 1919), 107 Atl. 109.

<sup>42</sup> *Deering v. Moore*, 86 Me. 181, 29 Atl. 988; *Morgan v. Smith*, 70 N. Y. 537.

<sup>43</sup> *Hood v. Hayward*, 124 N. Y. 1, 26 N. E. 331.

<sup>44</sup> *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Smith v. State*, 46 Md. 617; *State v. Matson*, 44 Mo. 305; *Massey v. Brown*, 4 S. Car. 85.

## CHAPTER XXXV

### SURETIES' RIGHTS AND REMEDIES

Sureties' equitable rights.....	
Subrogation.....	
The surety is entitled to be subrogated to securities held by the creditor.....	
The surety is subrogated to intangible advantages of the creditor.....	
Subrogation to rights of the creditor which have been legally transferred.....	
the surety's payment.....	
Subrogation is allowed only when debt is fully paid.....	
Surety of a surety is entitled to subrogation.....	
A surety is entitled to subrogation against a co-surety.....	
Security for several debts.....	
Subrogation against a bankrupt principal in favor of a surety.....	
debt.....	
The surety's right of reimbursement.....	
The surety's right of exoneration.....	
The surety's right to compel the creditor to resort first to securities.....	
principal debtor.....	
Contribution.....	
Nature and limits of the right of contribution.....	
Contribution where sureties are liable for different amounts.....	
Compensated sureties are entitled to contribution.....	
A surety must share with his co-sureties the benefit of securities.....	
Co-sureties and successive sureties.....	
A surety who pays unnecessarily is not entitled to indemnity.....	
Measure of surety's recovery.....	
The surety is limited to reimbursement.....	
When a surety who has paid the debt is denied relief against co-surety because of a defence of the latter.....	
Laches.....	

#### § 1264. Sureties' equitable rights.

Though a creditor is generally entitled to resort to any securities or obligations which he holds, the court, especially a court of equity, to adjust the parties so far as possible, so that the ultimate result accord with the equitable position of the parties, the principle by which this is accomplished is by the enforcement of equitable principles of (1) subrogation of the creditor's rights; (2) reimbursement of a surety.

pal debtor of whatever loss the surety has suffered from his suretyship; (3) exoneration by the principal debtor of the surety from his liability to the creditor before it has been enforced against him, and (4) contribution among several sureties.

### § 1265. Subrogation.

Subrogation is generally understood to mean putting one to whom a right does not legally belong in the position of the legal owner of the right. Sometimes, however, subrogation may involve the creation of a new right in favor of the party entitled to be subrogated, not the enforcement of the original right, for sometimes the original right has been cancelled by payment or otherwise, before subrogation takes place, and moreover the party subrogated generally enforces his claim in his own name without joining the creditor as a party defendant. But the original right measures the extent of the new right. Suretyship does not furnish the only application of the doctrine, but it furnishes the commonest one. A surety who has paid the debt is entitled to the right for the purpose of charging property or persons equitably bound to pay the debt before himself. The justice of the principle will be apparent if it is observed that in this way the creditor is denied the power of throwing the ultimate payment of the debt in one way or another as suits his caprice. Subrogation does not depend upon contract, but on the equities of the situation.<sup>1</sup> Therefore, a surety who did not become such at the request of the principal, and who has no privity of contract with him, is not thereby deprived of subrogation on payment of the debt.<sup>2</sup>

<sup>1</sup> *Duncan v. North and South Wales Bank*, 6 App. Cas. 1; *Ohmer v. Boyer*, 89 Ala. 273, 7 So. 663; *Talbot v. Wilkins*, 31 Ark. 411; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Bishop v. Rowe*, 71 Me. 263; *Stevens v. King*, 84 Me. 291, 24 Atl. 850; *Amory v. Lowell*, 1 Allen, 504; *Stewart v. Parcher*, 91 Minn. 517, 98 N. W. 650; *Union, etc., Banking Co. v. Peters*,

72 Miss. 1058, 18 So. 497, 30 L. R. A. 829; *Philbrick v. Shaw*, 61 N. H. 356; *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179; *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509; *In re Hoge's Estate*, 188 Pa. 527, 533, 41 Atl. 621, 1119; *Royalton Nat. Bank v. Cushing*, 53 Vt. 321.

<sup>2</sup> *Howard v. Burns*, 279 Ill. 256, 116 N. E. 703; *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Matthews v. Aikin*, 1 N. Y. 595; *Bishop v. Rowe*, 71

**§ 1266. The surety is entitled to be subrogated  
held by the creditor.**

On paying the debt the surety is entitled to be subrogated to securities held by the creditor.<sup>3</sup> The equity of the right is shown by the fact that it is immaterial whether the securities in question were given after the contract was entered into.<sup>4</sup> Or that the surety was ignorant of the existence of security at that time.<sup>5</sup> Nor is the right confined to ordinary kinds of collateral security. Where one who has entered into a contract to purchase land on paying the latter's obligation, the vendor's lien runs with the land.<sup>6</sup> So if the creditor has a lien to secure

Me. 263; *Burns v. Huntington Bank*, 1 Pen. & W. 395.

<sup>3</sup> *Yonge v. Reynell*, 9 Hare, 809; *Fawcetts v. Kimmey*, 33 Ala. 261; *Beaver v. Slanker*, 94 Ill. 175; *Howard v. Burns*, 279 Ill. 256, 116 N. E. 703; *Josselyn v. Edwards*, 57 Ind. 212; *Rand v. Barrett*, 66 Iowa, 731, 24 N. W. 530 (but see *Bockholt v. Kraft*, 78 Iowa, 661, 43 N. W. 539); *Storms v. Storms*, 3 Bush, 77; *Hardy Buggy Co. v. Paducah Banking Co.* (Ky.), 210 S. W. 452; *Interstate Trust & Co. v. Young*, 135 La. 465, 65 So. 611; *Maine Central R. v. National Surety Co.*, 113 Me. 465, 94 Atl. 929, L. R. A. 1916 A. 881; *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Taylor v. Tarr*, 84 Mo. 420; *Guthrie v. Ray*, 36 Neb. 612, 54 N. W. 971; *Ætna Ins. Co. v. Thompson*, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; *Young v. Vough*, 23 N. J. Eq. 325; *State Bank v. Smith*, 155 N. Y. 185, 49 N. E. 680; *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684, (but see *Browning v. Porter*, 116 N. C. 62, 20 S. E. 961); *Wills v. Fuller* (Okl.), 150 Pac. 693; *Gossin v. Brown*, 11 Pa. 527; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Beaver Trust Co. v. Morgan*, 259 Pa. 567, 103 Atl. 367; *Lowndes v. Chisholm*, 2 McC. Ch. 455, 16 Am. Dec. 667; *James v. Jaques*, 26 Tex. 320, 82 Am. Dec. 613; *National Bank v.*

*Cushing*, 53 Vt. 321; 17 Ir. Ch. 251. Cf. *In re* & Co., 225 Fed. 618.

<sup>4</sup> *Brandon v. Brandon*, 524; *Lake v. Brutton*, 440; *Havens v. Willis*, 3 N. E. 313; *Riverside*, 11 N. Y. S. 519; *See Meigs*, 169; *Scott v. (Ir.)*, 778.

<sup>5</sup> *Mahew v. Crickett*, 8 D. Lake v. Brutton, 8 D. Duncan, etc., Co. v. Wales Bank, 6 App. McLeod, 3 Ired. Eq. Bush, 18 Oh. St. 376; 17 W. Va. 474; *Scott (Ir.)*, 778. The right to securities given after the contract, as well as to those existing at the time the surety became

<sup>6</sup> *Ballew v. Roler*, 1 N. E. 976; *Highland Adm.*, 13 Ky. L. Rep. 866; *Tuck v. Calver*, 866; *Myres v. Yaple*, 60 Mich. 536; *Torp v. Gulseth*, 33 N. W. 550; *Smith v. Smith*, 447; *Fulkerson v. Br*, 371; *Ex parte Pettillo*, 8 Stenhouse v. Davis, 8 Deitzler v. Mishler, 37 v. Galliher, 10 Lea, 23; *v. Hatcher's Exr's*, 1 R

which the surety is liable, the latter on paying the debt is subrogated to the lien;<sup>7</sup> as he is likewise to the creditor's right against a fund held by the State for the security of creditors of the principal debtor.<sup>8</sup> So the sureties of a sheriff who have been forced to satisfy his liability to the owner of property which he had wrongly seized for the debt of a third party, succeed to the owner's right to reclaim the property or its value.<sup>9</sup>

**§ 1267. The surety is subrogated to intangible advantages of the creditor.**

Not only is a surety who has paid the debt subrogated to the creditor's claim against property of any kind held as security, but also to other advantages of the creditor in enforcing his claim. Thus a surety for a debtor of the Government on payment of the debt is entitled to the same priority as the Government.<sup>10</sup> So if the sureties of a trustee are made liable and have satisfied those injured by a breach of trust, they are subrogated both to the trustee's rights and to those of the *cestuis que trust* against those who participated in the wrongful acts.<sup>11</sup>

<sup>7</sup> So in the case of a corporation's lien on its stockholder's shares; *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Petersburg Savings & Ins. Co. v. Lumeden*, 75 Va. 327; a vendor's lien on land; *Lang v. Constance*, 20 Ky. L. Rep. 502, 46 S. W. 693; *Ellis v. Roscoe*, 4 Baxter, 418; *Uzzell v. Mack*, 4 Humph. 319, 40 Am. Dec. 648. (But see *Allen v. Caylor*, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31.) Statutory liens of various kinds. *Turner v. Teague*, 73 Ala. 554; *Watts v. Eufaula Bank*, 76 Ala. 474; *Cummings v. May*, 110 Ala. 479, 20 So. 307; *Singleton v. United States & Guaranty Co.*, 195 Ala. 506, 70 So. 169; *Richeson v. Crawford*, 94 Ill. 165, 101 Ill. 351; *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *McCoy v. Wood*, 70 N. C. 125; *Barger v. Buckland*, 28 Gratt. 850.

But a surety on a bond given to discharge an admiralty lien, will not on paying the bond be subrogated to the lien, for that was discharged when the bond was given. *The Robertson*, 8 Biss. C. C. 180.

<sup>8</sup> *National Surety Co. v. Berggren*, 126 Minn. 188, 148 N. W. 55.

<sup>9</sup> *Skiff v. Cross*, 21 Iowa, 459; *Philbrick v. Shaw*, 61 N. H. 356.

<sup>10</sup> *In re Churchill*, 39 Ch. Div. 174; *United States v. Herron*, 20 Wall. 251, 22 L. R. A. 275; *Richeson v. Crawford*, 94 Ill. 165; *Bolts' Estate*, 133 Pa. 77, 19 Atl. 303. On the same principle a surety was subrogated to a right of priority of the creditor against an insolvent railroad company in *Love v. North American Co.*, 229 Fed. 103, 143 C. C. A. 379.

<sup>11</sup> *Richeson v. Crawford*, 94 Ill. 165; *Wheeler v. Hawkins*, 116 Ind. 515, 19

**§ 1268. Subrogation to rights of the creditor which  
legally destroyed by the surety's paym**

Under a narrow view taken by the English courts, it was held that a surety could not be subrogated to the rights of the creditor which were legally destroyed by the debt. That is, the advantage which the creditor has as a bond creditor, or a judgment creditor, does not enure to the benefit of the surety, since his payment satisfies the bond or the judgment.<sup>12</sup> And this rule followed more or less completely in a few of the States.<sup>13</sup> As subrogation is an equitable doctrine, it seems no difficulty in keeping alive for the benefit of the surety an obligation which has been satisfied at the expense of a refusal of equity to allow a legal defence its operation when injustice will thereby be caused, is sufficient. This result has been achieved in England by stating that, on the same principle is largely adopted in the United States.

N. E. 470; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414; *Wernecke v. Kenyon*, 66 Mo. 275; *Clark v. First Bank of Harrisonville*, 57 Mo. App. 277; *Brown v. Houck*, 41 Hun, 16; *Bunting v. Ricks*, 2 Dev. & B. Eq. 130, 32 Am. Dec. 699; *Thompson v. Humphrey*, 83 N. C. 416; *Rhame v. Lewis*, 13 Rich. Eq. 269; *Edmunds v. Venable*, 1 Pat. & H. 121; *Pinckard v. Woods*, 8 Gratt. 140.

<sup>13</sup> *Jones v. Davis*, 4 Russell, 277; *Armitage v. Baldwin*, 5 Beav. 278; *Dowbiggen v. Bourne*, 2 Y. & C. Ex. 462.

<sup>13</sup> *Whittier v. Heminway*, 22 Me. 238, 38 Am. Dec. 309; *Adams v. Drake*, 11 Cush. 504; *Holmes v. Day*, 108 Mass. 563; *New Bedford Savings Inst. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289; *Frevert v. Henry*, 14 Nev. 191; *Moore v. Campbell*, 36 Vt. 361.

<sup>14</sup> Mercantile Law Amendment Act, 19-20 Victoria, c. 97, Sec. 5.

<sup>15</sup> *Schindelholz v. Cullum*, 55 Fed. 885, 889, 5 C. C. A. 293, 12 U. S. App. 242; *Bragg v. Patterson*, 85 Ala. 233, 4 So. 716 (statutory); *Talbot v.*

Wilkins, 31 Ark. 411,  
v. Riehl, 127 Cal. 365  
762, 78 Am. St. Rep. (1898)  
Godwin, 2 Del. Ch.  
Wilson, 4 Del. Ch.  
v. Clark, 101 Ga. 214  
(statutory); Rice v. Rice  
Manford v. Firth, 68  
v. Traylor, 130 Ind.  
N. E. 486, 16 L. R. A.  
worth v. Pearson, 53 I.  
818; Schleissman v.  
Ia. 338, 33 N. W. 459; 1  
29 Kans. 200 (statute)  
Schram, 73 Kan. 368,  
Roberts v. Bruce, 12  
932, 15 S. W. 872; Co  
16 La. Ann. 108, 79  
Wallace v. Jones, 110  
Atl. 769 (statutory); Sn  
33 Mich. 183; Kimm  
Minn. 265, 9 N. W.  
Smith, 57 Miss. 54  
Benne v. Schnecko, 10  
S. W. 82; Bledsoe v. N  
521; Rice v. Hearn, 1  
13 S. E. 895; Fowle v  
N. C. 537, 84 S. E. 8

though the procedure in the various States which is essential for the protection of the surety is not uniform.

**§ 1269. Subrogation is allowed only when the debt is fully paid.**

The surety's right of subrogation does not arise until the debt is paid in full. A partial payment of the debt even though it may be of the full amount for which the surety has bound himself, will not entitle him to subrogation to the creditor's rights and securities.<sup>16</sup> But "while it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right becomes an inchoate one as soon as they have entered into the relation of suretyship; and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time."<sup>17</sup> And all persons who have in the meantime received any securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit."<sup>18</sup>

Trusdell, 44 N. J. L. 597 (statutory); McKenna v. Corcoran, 70 N. J. Eq. 627, 61 Atl. 1026; Brewer v. Franklin Mills, 42 N. H. 292; Wilson v. Burney, 8 Neb. 39; Townsend v. Whitney, 75 N. Y. 425; City Trust Co. v. American Brewing Co., 70 N. Y. App. D. 511, affirmed, 174 N. Y. 486, 67 N. E. 62; Peters v. McWilliams, 36 Oh. St. 155 (statutory); Cottrell's App., 23 Pa. 294; Richter v. Cummings, 60 Pa. 441; Boltz's Estate, 133 Pa. 77, 19 Atl. 303; Garvin v. Garvin, 27 S. C. 472, 4 S. E. 148; M'Nairy v. Eastland, 10 Yerg. 310; Krall v. Campbell Printing Press Co., 79 Tex. 556, 15 S. W. 565.

<sup>16</sup> Cooper v. Jenkins, 32 Beav. 337; Peoples v. Peoples Bros., Inc., 254 Fed. 489; Schoonover v. Allen, 40

Ark. 132; Rice v. Morris, 82 Ind. 204; Swan v. Patterson, 7 Md. 164; Wilcox v. Fairhaven Bank, 7 Allen, 270; Musgrave v. Dickson, 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.

<sup>17</sup> Labbe v. Bernard, 196 Mass. 551, 82 N. E. 688, 14 L. R. A. (N. S.) 457; citing Rice v. Southgate, 16 Gray, 142; Wood v. Lake, 62 Ala. 489; Lewis v. Faber, 65 Ala. 460; Conner v. Howe, 35 Minn. 518, 29 N. W. 314; McArthur v. Martin, 23 Minn. 74; Forbes v. Jackson, 19 Ch. D. 615. See also Stavrelis v. Zacharias, (N. H. 1919), 106 Atl. 306.

<sup>18</sup> Labbe v. Berrard, 196 Mass. 551, 82 N. E. 688, 14 L. R. A. (N. S.) 457; citing Norton v. Soule, 2 Greenl. 341; Atwood v. Vincent, 17 Conn. 575; Greene v. Ferrie, 1 Desaus. Eq.

### § 1270. Surety of a surety is entitled to subrogation.

The surety of a surety is entitled to the same right of subrogation to which the prior surety is entitled; for as to the subsequent surety, the prior one is a principal and the subsequent surety having paid the debt stands in the shoes of the prior surety, and, by right of the latter, in the shoes of the creditor.<sup>19</sup>

### § 1271. A surety is entitled to subrogation against a co-surety.

If one co-surety pays the debt he is generally held entitled to enforce by way of subrogation the creditor's right against co-sureties; being limited, however, in the enforcement of the right to the amount necessary to repay him for any excess beyond what as between himself and his co-sureties he ought to pay.<sup>20</sup> This principle, however, has not been universally recognized in the decisions.<sup>21</sup>

In effect the same result is thus achieved if the co-sureties are solvent as by enforcing contribution. Where, however,

164; *Drew v. Lockett*, 32 Beav. 499. See also *Empire State Surety Co. v. Cohen*, 93 N. Y. Misc. 299, 156 N. Y. S. 935.

<sup>19</sup> *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. See also *Hall v. Smith*, 5 How. 96, 12 L. Ed. 66.

<sup>20</sup> *Pratt v. Law*, 9 Cranch, 456, 3 L. Ed. 791, s. c. *sub nom.* *Campbell v. Pratt*, 5 Wheat. 429, 5 L. Ed. 126; *Reber v. Gundy*, 13 Fed. 53. *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; *Sumner v. Rhodes*, 14 Conn. 135; *Simpson v. Gardiner*, 97 Ill. 237; *Schoenewald v. Dieden*, 8 Ill. App. 389; *Hall v. Hall*, 34 Ind. 314; *Koboliska v. Swehla*, 107 Iowa, 124, 77 N. W. 576; *Smith v. Latimer*, 15 B. Mon. 75; *Whitehead's Succ.*, 3 La. Ann. 396; *Henderson v. McDuffie*, 5 N. H. 38, 20 Am. Dec. 557; *Crafts v. Mott*, 4 N. Y. 603; *Vincent v. Logsdon*, 17 Oreg. 284, 20 Pac. 429; *Ackerman's App.*, 106 Pa. 1 (overruling contrary intimations in earlier Pennsylvania cases. But

see *In re Hoge's Estate*, 188 Pa. 527, 533, 41 Atl. 621, 1119); *Haverford L. & B. Assoc. v. Fire Ass'n*, 180 Pa. 522, 37 Atl. 179, 57 Am. St. Rep. 657; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Greenlaw v. Pettit*, 87 Tenn. 467, 11 S. W. 357; *Stebbins v. Willard*, 53 Vt. 665; *Dobyns v. Rawley*, 76 Va. 537.

<sup>21</sup> *Bartlett v. McRæ*, 4 Ala. 688; *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236; *Clark v. Warren*, 55 Ga. 575; *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38; *Frank v. Traylor*, 130 Ind. 145, 29 N. E. 486; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 Mass. 153; *Bryant v. Smith*, 10 Cush. 169; *Adams v. Drake*, 11 Cush. 504; *Stanley v. Nutter*, 16 N. H. 22; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' Bank*, 74 N. Y. 228; *Towe v. Felton*, 7 Jones (N. C.) 216; *Baldwin v. Merrill*, 8 Humph. 132; *Maxwell v. Owen*, 7 Coldw. 630.

the co-sureties are insolvent this is not the case. A right of contribution against an insolvent co-surety gives merely a provable claim for the amount due. Not so the right of subrogation. Where one of two sureties pays the debt in full and his co-surety is bankrupt, the surety who has paid is subrogated to the creditor's proof against the bankrupt's estate if already made, or if the creditor has not proved, the surety may prove for the full amount of the debt, being restricted, however, in the recovery of dividends to an amount equal to the share of the debt, which the bankrupt equitably ought to pay.<sup>22</sup> Any other rule would enable the creditor to vary the ultimate payments of the two sureties, for the creditor unquestionably can either prove against the bankrupt surety for the full debt, and then recover from the solvent surety the deficiency; or at his option sue the latter for the whole debt without proving against the bankrupt estate. If the solvent surety cannot then by subrogation prove for the full debt against the bankrupt estate, the ultimate situation of the parties will be varied according as the creditor chooses one or the other course.

### § 1272. Security for several debts.

Where a surety pays his entire indebtedness he is entitled to subrogation to any right or security of the creditor exclusively applicable to that debt. But where the creditor holds security for several debts, payment of his entire obligation by a surety for one of those debts will not entitle him to subrogation to any part of the security until the creditor has satisfied all the debts to which the security was applicable.<sup>23</sup>

<sup>22</sup> *Ex parte* Stokes, De Gex, 618; *In re* Parker, [1894], 3 Ch. 400; Hess's Estate, 69 Pa. 272; *Pace v. Pace's Adm'r*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459. See also Federal Bankruptcy Act, Sec. 57 (i). But see *contra*—*Maxwell v. Heron*, 3 Ross, L. C. 129, s. c. *sub nom.* *Keith v. Forbes*, 3 Paton, 350; *Apperson v. Wilbourn*, 58 Miss. 439, 444; *New*

*Bedford Institution v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289.

<sup>23</sup> *Rice v. Morris*, 82 Ind. 204; *Welch v. Parran*, 2 Gill, 320; *Parker v. Mercer*, 7 Miss. 320, 38 Am. Dec. 438; *Mathews v. Switzler*, 46 Mo. 301 (compare *Allison v. Sutherlin*, 50 Mo. 274); *Grubbs v. Wysora*, 32 Gratt. 127. See also *National City Bank v. Zimmer, etc., Co.*, 132 Minn. 211,

**§ 1273. Subrogation against a bankrupt principal surety for part of a debt.**

It is obvious that if a surety pays the whole for which he is bound, he is entitled to be the creditor's claim against a bankrupt principal, though the creditor has other claims against him not fully satisfied, he should not receive, and received should not keep, the dividends of the claim the surety has paid. This principle has been extended to England,<sup>24</sup> and it is there held that "when a surety pays for a part of the debt, and has paid that part he is entitled to receive the dividend which the principal pays in respect of that sum which the surety has paid. And similarly such a surety is entitled to subrogate a ratable portion of the securities held by the creditor for the whole debt, to the exclusion of any right of the creditor to apply that portion to the balance of the debt. A distinction very difficult of application is to be made between a surety for part of the debt and a surety for the whole with liability limited to a fixed sum. In the latter case the surety is not subrogated to the dividends unless the debt is fully paid."<sup>25</sup> The English doctrine has been criticised, and is not generally followed in the United States. There is no equity on which to base the deprivation of any of his legal rights until he has received full payment. To impute any intention of the sort to the creditor involves the baldest fiction. If indeed the creditor

<sup>24</sup> 156 N. W. 265; *Patch v. First Nat. Bank*, 90 Vt. 4, 96 Atl. 423.

<sup>25</sup> The extended principle was first announced in *Ex parte Rushforth*, 10 Ves. 409.

<sup>26</sup> *Gray v. Seckham*, L. R. 7 Ch. App. 680.

<sup>27</sup> *Harmer v. Gibb*, [1911] Sc. Sess. Cas. 1341.

<sup>28</sup> *Ellis v. Emmanuel*, 1 Ex. D. 157; *In re Sass*, [1896] 2 Q. B. 12. The surety may by his contract with the creditor surrender this right. *Midland Banking Co. v. Chambers*, L. R. 4 Ch. 398.

<sup>29</sup> *Knaff v. Knoxville Co.*, 133 Tenn. 655, 1917 C. Ann. Cas. 1917 C. Board of Health v. etc., Co., 137 La. 422, 1916 B. 1251. *Cas. 1916 B. 1251 of Banking v. Chels*, 161 Mich. 691, 125 N. W. 351. But see *C. Neb. 480*, 160 N. W. German Ins. Co. v. etc., Co., 51 N. Y. M. S. 883.

with the surety that the total debt should not exceed the guaranteed amount, there would not only be such an equity, but the surety would be discharged altogether by the creditor's breach of contract if he permitted a greater indebtedness,<sup>29</sup> but this is not the situation supposed in the English cases.

#### § 1274. The surety's right of reimbursement.

It was customary formerly for sureties to take from the principal at whose request they entered into an obligation a counter-bond of indemnity, but it early became recognized that even in the absence of any express contract of indemnity the principal was bound impliedly. This was first so held in equity,<sup>30</sup> and later an implied contract was enforced at law.<sup>31</sup> Where there are several sureties who jointly pay the whole or part of the debt, the principal is under an implied obligation to them jointly, for the whole, as well as to each of them severally for the share he has paid.<sup>32</sup> The implied obligation to indemnify a surety matures only when he has been injured by being compelled to make payment of the debt;<sup>33</sup> but this principle has been extended generally so as to allow a surety who has given the creditor a negotiable instrument in payment of the debt to sue the principal though the negotiable instrument has not been paid.<sup>34</sup> The extension, however, is confined to negotiable

<sup>29</sup> *Supra*, §§ 1239 *et seq.*

<sup>30</sup> *Ford v. Stobridge*, Nelson Ch. 24. See also *Scot v. Stephenson*, 1 Lev. 71. In *Layer v. Nelson*, 1 Vernon, 456, the surety's right was rested on the custom of London.

<sup>31</sup> *Decker v. Pope*, cited in 1 Selwyn, N. P. (13th ed.), 91; *Toussaint v. Martinnant*, 2 T. R. 100, 105; *Appleton v. Bascom*, 3 Metc. 169; and see cases on indemnity cited *infra, passim*.

<sup>32</sup> *Osborne v. Harper*, 5 East, 224; *Dussol v. Bruguiere*, 50 Cal. 456; *Hull v. Myers*, 90 Ga. 674, 686, 16 S. E. 653; *Lombard v. Cobb*, 14 Me. 222, 224; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Pearson v. Parker*, 3 N. H. 366; *Commonwealth v. Cox*, 36 Pa. 442.

But see *contra* *Kelby v. Steel*, 5 Esp. 194; *Gould v. Gould*, 8 Cow. 168.

<sup>33</sup> *Blanchard v. Blanchard*, 201 N. Y. 134, 94 N. E. 630, and see cases in the following notes.

<sup>34</sup> *Barclay v. Gooch*, 2 Esp. 571; *M'Kenna v. Harnett*, 13 Ir. L. Rep. 206; *Smith v. Pitts*, 167 Ala. 461, 466, 52 So. 402; *Bone v. Torry*, 16 Ark. 83; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; *Mims v. McDowell*, 4 Ga. 182; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Sapp v. Aiken*, 68 Ia. 699, 28 N. W. 24; *Riser v. Callen*, 27 Kan. 339; *Stubbins v. Mitchell*, 82 Ky. 535; *Green v. Anderson*, 19 Ky. 1187, 43 S. W. 195;

obligations. If other obligations are given to pay them before suing the principal for indemnity on contract, however, a party may promise on maturity an obligation for which the promisee indemnify the promisee from liability. At least a contract of indemnity before payment of is dependent on the construction of the contract are broad enough to amount to an indemnity and not merely an indemnity against payment of liability, recovery will be allowed as soon as indemnified has incurred liability.<sup>36</sup> But even in the absence of words expressly guaranteeing from liability as distinguished from freedom from liability, the court will usually enforce the obligation and compel the promisee to indemnify before payment of it by

#### § 1275. The surety's right of exoneration.

The hardship upon a surety of compelling him to pay the creditor and thereafter seek redress against the principal is in some degree mitigated by equity which, as stated in the preceding section, enforces specifically the principle of the implied obligation to indemnify the surety—allowing him to sue the principal on maturity of the obligation on the ground that the principal shall pay the creditor, thereby exonerating the surety.

*Doolittle v. Dwight*, 2 Met. 561; *Hearne v. Keath*, 63 Mo. 84; *Chapman v. Garber*, 46 Neb. 16, 19, 64 N. W. 362; *Pearson v. Parker*, 3 N. H. 366; *Rodman v. Hedden*, 10 Wend. 498; *Howe v. Buffalo Co.*, 37 N. Y. 297; *Morrison v. Berkey*, 7 S. & R. 238, 246; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232. But see *Maxwell v. Jameson*, 2 B. & Ald. 51; *Brisendine v. Martin*, 1 Ired. 286.

<sup>36</sup> *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51; *Romine v. Romine*, 59 Ind. 346; *Cumming v. Hackley*, 8 Johns, 202; *Brisendine v. Martin*, 1 Ired. 286; *Morrison v. Berkey*, 7 S. & R. 238; *Peters v. Barnhill*, 1 Hill (S. C.), 234, 236, 237;

*Boulware v. Robin*, 101 Am. Dec. 117.

<sup>37</sup> *Gage v. Lewis*, 101 Ill. 117; *Hunt*, 3 D. 117; *Teer*, 21 U. Can. Q. 17, 24; also *infra*, § 1276.

<sup>38</sup> *Lacy v. Hill*, 101 Ill. 117; *In re Law Guaranty Co.*, [1914] 2 Ch. 617; *Insurance Co. v. Rawson*, 100 Fed. 548; *Central Trust Co.*, 100 Fed. 548; *aff'd* 87 Fed. 23; 194 Pa. 94, 44 Atl. 460. the following note: *Salvage Assoc.*, 101 Ill. 117.

ing the surety;<sup>38</sup> and where the principal has expressly or impliedly promised the surety to pay the debt, a breach of this promise enables the surety to recover as damages the amount of the debt, even though he has not paid it, since he has been wrongfully subjected to liability.<sup>39</sup>

A co-surety has an equitable right to exact from another surety payment by the latter of his share of the debt. In some decisions it is required that the surety seeking relief shall have had the claim against him established by judgment or decree of court;<sup>40</sup> in others no such requirement is made.<sup>41</sup>

**§ 1276. The surety's right to compel the creditor to resort first to security, or to the principal debtor.**

"In their main features, the English common law and the Roman Civil law differed radically from each other touching the right of the surety to require the creditor to proceed against the principal debtor or the security the debtor had given the creditor before coercing payment by the surety. In the earlier period of Roman jurisprudence, the right of the surety to compel the creditors to resort first to the principal to collect

<sup>38</sup> *Ranelaugh v. Hayes*, 1 Vern. 189; *Lloyd v. Dimmack*, 7 Ch. D. 398; *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 294; *Merwin v. Austin*, 58 Conn. 22, 24, 18 Atl. 1029, 7 L. R. A. 84; *Hayden v. Thrasher*, 18 Fla. 795; *Macfie v. Kilauea Sugar Co.*, 6 Hawaiian, 440; *Street v. Chicago, etc., Storage Co.*, 157 Ill. 605, 41 N. E. 1108; *Keach v. Hamilton*, 84 Ill. App. 413; *Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Morrison v. Poyntz*, 7 Dana, 307, 308, 32 Am. Dec. 92; *Meador v. Meador*, 88 Ky. 217, 10 S. W. 651; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Bellows v. Lovell*, 5 Pick. 307, 310; *Comstock v. Corbin*, 191 Mich. 639, 158 N. W. 106; *Huey v. Pinney*, 5 Minn. 310, 322 (statutory); *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Holcombe v. Fetter*, 70 N. J. Eq. 300, 67 Atl. 1003; *Marsh v. Pike*, 10 Paige, 595; *Ferrer v. Barrett*, 4 Jones Eq. 455;

*Hale v. Wetmore*, 4 Oh. St. 600; *Ardesco Co. v. North American Oil Co.*, 66 Pa. 375; *Norton v. Reid*, 11 S. Car. 593; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Saylors v. Saylors*, 3 Heisk. 525 (but see *Gilliam v. Esselman*, 5 Sneed, 86); *Bishop v. Day*, 13 Vt. 81; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172; *Carr v. Davis*, 64 W. Va. 522, 63 S. E. 326; *Harris v. Newell*, 42 Wis. 687, 691; *Dobie v. Fidelity, etc., Co.*, 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135; *Mathews v. Saurin*, L. R. 31 Ir. 181.

<sup>39</sup> See *infra*, § 1408.

<sup>40</sup> *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *McKenna v. Witherspoon*, 2 Rich. Eq. 20.

<sup>41</sup> *Hyde v. Tracy*, 2 Day, 491; *Hodgson v. Baldwin*, 65 Ill. 532; *Morrison v. Poyntz*, 7 Dana, 307, 32 Am. Dec. 92; *Reeder v. Union Trust Co.*, 26 Pa. Dist. Ct. 833.

his demand appears to have been well established. The rule was gradually departed from. Justinian stored it, and from his time the doctrine was recognized throughout the empire. It has been the prudence of many of the nations of Europe.<sup>42</sup> It secured a footing in England. There the common law has prevailed from the earliest times. The common law is that the surety must pay and seek reimbursement from the principal or out of the securities the latter has in his hands. This was always the rule in courts of law, and in bankruptcy proceedings a rule somewhat different from that of the Civil law grew up. In all such cases it was required that the creditor should be saved from loss, and from all risk.<sup>43</sup> When the object of the appeal to equity was to compel the creditor to release his collaterals in his hands before proceeding against the principal, the foundation of equitable relief was the inability of the creditor himself to enforce such collateral after paying the debt, or the possibility that the creditor by some act had lost the value or destroyed the legality. The mere fact that the creditor held security for the debt did not entitle the creditor to equity for a decree that the creditor look to the securities for his pay. In such a case the surety was required to pay himself by paying the claim, and by being subrogated to the creditor's rights to the security."<sup>44</sup> In some cases, however, the right of the surety to compel the creditor

<sup>42</sup> *Bingham v. Mears*, 4 N. D. 437, 440, 61 N. W. 808, 27 L. R. A. 257, citing *Burge, Sur.*, pp. 329-341; *Hayes v. Ward*, 4 Johns. Ch. 123, 133, 8 Am. Dec. 554. See also the German Civil Code, §§ 771, 772.

<sup>43</sup> *Ibid.*, citing 1 Brandt, *Surety*, § 238; 24 Am. & Eng. Enc. Law, p. 799, and cases.

<sup>44</sup> *Ibid.* See also *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632, 12 U. S. App. 629; *Wilds v. Attix*, 4 Del. Ch. 253, 258; *Thorn v. Pinkham*, 84 Me. 101, 104, 24 Atl. 718, 30 Am. St. Rep. 335; *Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *Lee v.*

*Griffin*, 31 Miss. 1; *Co. v. Smith*, 52 Me. 1; *v. Farmers' State Bank*, 101 N. W. 252; *Freehold v. Brick*, 37 N. J. 1; *Nat. Bank v. Wood*, 100 Am. Rep. 66; *Stein v. Hun*, 368, 35 N. Y. 1; *v. Portland Sav. Bk.*, 64 Pac. 388; *Erwin v. De Nemours Powder Co.*, 156 S. W. 121; *Montrouzier v. Steppenson* (Tex. S. W. 121; *Montrouzier v. Steppenson*, 21 Up. Can. C. P. 1).

the security before suing the surety has been more broadly stated or applied.<sup>45</sup> How far the surety may affect the creditor's position by a request *in pais* to sue the principal has been previously considered.<sup>46</sup> In view of the attitude of many American courts on the latter point it is not surprising that it has been held or suggested in a number of cases that on application to a court of equity by a surety, after maturity of the debt, the court will order the creditor to sue the principal debtor,<sup>47</sup> but no such right is universally conceded.<sup>48</sup>

### § 1277. Contribution.

The right of one of two or more sureties who has paid more than the share which as between himself and his co-sureties, he ought to pay, to recover the excess from them, was early allowed in equity (though not at law) on general principles of justice,<sup>49</sup> and has been continuously recognized subsequently. At law the right was first recognized about the end of the eighteenth century,<sup>50</sup> and has since become well established. At law, however, the plaintiff can generally recover but an aliquot share from a co-surety,<sup>51</sup> and each co-

<sup>45</sup> *Re Babcock*, 3 Story, 393; *Richards v. Osceola Bank*, 79 Ia. 707, 713, 45 N. W. 294; *Philadelphia & Reading R. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356; *Kidd v. Hurley*, 54 N. J. Eq. 177, 33 Atl. 1057; *Wright v. Austin*, 56 Barb. 13; *Sheppard v. Conley*, 9 N. Y. S. 777; *Polk v. Galant*, 2 Dev. & B. Eq. 395; *Egerton v. Alley*, 6 Ired. Eq. 188; *Hatcher's Adm. v. Hatcher's Ex.*, 1 Rand. 53.

<sup>46</sup> *Supra*, § 1236.

<sup>47</sup> *Re Babcock*, 3 Story, 393; *Rice v. Downing*, 12 B. Mon. 44, 45; *Sasscer v. Young*, 6 Gill & J. 243, 248; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Bellows v. Lovell*, 5 Pick. 307, 310; *King v. Baldwin*, 17 Johns. 384, 390, 8 Am. Dec. 415, 2 Johns. Ch. 554, 561; *Bingham v. Mears*, 4 N. Dak. 437, 61 N. W. 808, 27 L. R. A. 257; *Hogaboom v. Herrick*, 4 Vt. 131, 134; *Harris v. Newell*, 42 Wis. 687, 691. In many of these cases

the qualification is made that indemnity for costs of the suit against the principal shall be given by the surety.

<sup>48</sup> *Woffington v. Sparks*, 2 Ves. 569; *First Nat. Bank v. Wood*, 71 N. Y. 405, 411, 27 Am. Rep. 66; *Meade v. Grigsby's Adm.*, 26 Gratt. 612; *Penn v. Ingles*, 82 Va. 65. But where the creditor goes into equity to enforce his claim against principal and sureties, the burden will be laid first on the principal. *Penn v. Ingles, supra*; *Paxton v. Rich*, 85 Va. 378.

<sup>49</sup> *Wormleighton and Hunter's Case*, Godbolt, 243; *Fleetwood v. Charnock*, Nelson, 10; *Peter v. Rich*, 1 Reports in Ch. 34.

<sup>50</sup> *Turner v. Davies*, 2 Esp. 479; *Cowell v. Edwards*, 2 B. & P. 268.

<sup>51</sup> *Cowell v. Edwards*, 2 B. & P. 268; *Brown v. Lee*, 6 B. & C. 689, 697; *United States Fidelity &c. Co. v. Naylor*, 237 Fed. 314, 323, 151

surety from whom contribution is claimed separately.<sup>52</sup> In equity, however, insolvent those residing outside the jurisdiction<sup>54</sup> are not

C. C. A. 20; *Chipman v. Morrill*, 20 Cal. 130; *Trego v. Cunningham's Est.*, 267 Ill. 367, 108 N. E. 350; *Morrison v. Poyntz*, 7 Dana, 307, 308, 32 Am. Dec. 92; *Young v. Lyons*, 8 Gill, 162, 165; *Griffin v. Kelleher*, 132 Mass. 82; *Dodd v. Winn*, 27 Mo. 501; *Stothoff v. Dunham*, 19 N. J. (4 Harrison) 181; *Easterly v. Barber*, 66 N. Y. 433; *Adams v. Hayes*, 120 N. C. 383, 386, 27 S. E. 47; *Fischer v. Gaither*, 32 Oreg. 161, 51 Pac. 736; *Croft v. Moore*, 9 Watts, 451, 453; *Aikin v. Peay*, 5 Strob. 15 (but see *Harris v. Ferguson*, 2 Bail. 397, 401); *Riley v. Rhea*, 5 Lea, 115; *Gross v. Davis*, 87 Tenn. 226, 230, 11 S. W. 92, 10 Am. St. Rep. 635; *Acers v. Curtis*, 68 Tex. 423, 4 S. W. 551; *Tarr v. Ravenscroft*, 12 Gratt. 642, 652. In some States, however, courts of law like courts of equity disregard insolvent sureties. *Couch v. Terry's Adm.*, 12 Ala. 225 (statutory); *McAllister v. Irwin's Est.*, 31 Col. 253, 254, 73 Pac. 47; *Michael v. Allbright*, 126 Ind. 172, 25 N. E. 902; *Sanders v. Herndon*, 122 Ky. 760, 765, 93 S. W. 14, 5 L. R. A. (N. S.) 1072, 121 Am. St. Rep. 493 (statutory); *Van Petten v. Richardson*, 68 Mo. 379 (statutory); *Cass v. Stearns*, 66 N. H. 301, 303, 23 Atl. 80; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Wetmore & Morse Granite Co. v. Ryle* (Vt.), 107 Atl. 108; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294 (statutory).

<sup>52</sup> *Chipman v. Morrill*, 20 Cal. 130; *Voss v. Lewis*, 126 Ind. 155, 25 N. E. 892; *Powell v. Matthis*, 4 Ired. 83, 40 Am. Dec. 427; *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47; *Burnham v. Choat*, 5 Up. Can. Q. B. (O. S.) 736.

<sup>53</sup> *Peter v. Rich*, 1 Reports in Ch. 34; *Lowe v. Dixon*, 16 Q. B. D. 455,

458; *United States v. Naylor*, 237 Fed. C. C. A. 20; *W. Kahn*, 93 Ala. 201, 4 v. *Riehl*, 127 Cal. 78 Am. St. Rep. 60 v. *St. Paul Ins. Co.* *Hayden v. Thrash* 805; *Trego v. Cur* 267 Ill. 367, 108 N v. *Pence*, 10 Ind. A 484; *Greene v. A* 216, 43 S. W. 191 *Donahue*, 104 Ky. 1 Young v. *Lyons*, 8 v. *Kelleher*, 132 Ma v. *Goulden*, 52 Mic 731; *Comstock v.* 629, 158 N. W. 10 27 Mo. 501, 502; 44 Neb. 610, 63 N Wyckoff, 42 N. J. 679; *Jones v. Blau* 115, 51 Am. Dec. George, 2 Rich. Eq. 87 Tenn. 226, 230, Am. St. Rep. 635; 68 Tex. 423, 425, 4 v. *Harrington*, 18 v. *Duncan* (Va.), 9 blom v. *Johnston*, 11 Pac. 972; *Faurot* 569, 57 N. W. 294; 110 Wis. 276, 85 McDonaghs, Ir. R. Kelvev v. *Davis*, 1

<sup>54</sup> *United States v. Naylor*, 237 Fed. C. C. A. 20; *Secur* Paul Ins. Co., 50 v. *Taylor*, 5 Dana, 677; *Wood v. Lelan* 387; *Stewart v. G* 143, 17 N. W. 731; 51 N. H. 613; *Jones* Eq. 115, 51 Am.

the calculation. At law, moreover, in order to make out his case, a plaintiff seeking contribution need not allege or prove the insolvency of the principal debtor;<sup>55</sup> whereas in equity the insolvency of the principal must be alleged and proved or he must be joined as a party defendant,<sup>56</sup> and all solvent co-sureties within the jurisdiction must also be made parties.<sup>57</sup>

The right of contribution may frequently be given by express contract or by a contract implied in fact, but the existence of the right does not depend on such a contract. It, therefore, makes no difference as to the right to claim contribution that each of the sureties was ignorant that the other was also bound for payment of the debt;<sup>58</sup> and it is immaterial that sureties are bound by different contracts. If they are liable for the same debt, one of them who pays is entitled to contribution from the others.<sup>59</sup>

*Kenna v. George*, 2 Rich. Eq. 15; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294.

<sup>55</sup> *Buckner's Adm. v. Stewart*, 34 Ala. 529; *Taylor v. Reynolds*, 53 Cal. 686; *Sloo v. Pool*, 15 Ill. 47; *Rankin v. Collins*, 50 Ind. 158; *Goodall v. Wentworth*, 20 Me. 322; *Mosely v. Fullerton*, 59 Mo. App. 143; *Smith v. Mason*, 44 Nev. 610, 63 N. W. 41; *Odlin v. Greenleaf*, 3 N. H. 270; *Lucas v. Curry's Ex'rs*, 2 Bail. 403. But see *contra*—*Bolling v. Doneghy*, 1 Duv. 220; *Glasscock v. Hamilton*, 62 Tex. 143.

<sup>56</sup> *Lawson v. Wright*, 1 Cox Eq. 275; *Couch v. Terry's Adm.*, 12 Ala. 225, 229; *Chrisman v. Jones*, 34 Ark. 73; *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Daniel v. Ballard*, 2 Dana, 296; *Byers v. McClanahan*, 6 Gill, & J. 250; *Stone v. Buckner*, 20 Miss. 73; *Allen v. Wood*, 3 Ired. Eq. 386; *Fischer v. Gaither*, 32 Oreg. 161, 51 Pac. 736; *Gross v. Davis*, 87 Tenn. 226, 230, 11 S. W. 92, 10 Am. St. Rep. 635.

<sup>57</sup> *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Young v. Lyons*, 8 Gill, 162;

*Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47; *Bruce v. Bickerton*, 18 W. Va. 342.

<sup>58</sup> *Muckenthaler v. Noller* (Kan.), 180 Pac. 453; *Warner v. Morrison*, 3 Allen, 566.

<sup>59</sup> *Deering v. Winchelsea*, 2 B. & P. 270; *In re Ennis*, [1893] 3 Ch. 238; *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Powell v. Powell*, 48 Cal. 234; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Stevens v. Tucker*, 87 Ind. 109; *Muckenthaler v. Noller* (Kan.), 180 Pac. 453; *Cobb v. Haynes*, 8 B. Mon. 137; *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Craig v. Ankeney*, 4 Gill. 225; *Brooks v. Whitmore*, 142 Mass. 399, 8 N. E. 117; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641; *Young v. Shunk*, 30 Minn. 503, 16 N. W. 402; *Wood v. Williams*, 61 Mo. 63; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Unangst v. Roe*, 177 N. Y. S. 706; *Yawger v. American Surety Co.*, 212 N. Y. 292, 106 N. E. 64, L. R. A. 1915 D. 481; *Robinson v. Boyd*, 60 Oh. St. 57, 53 N. E. 494; *Thompson v. Dekum*, 32 Oreg. 506, 52 Pac. 517, 755; *Commonwealth v. Cox*, 36 Pa.

## § 1278. Nature and limits of

The obligation exists from the time of suretyship is entered into until after payment is made; that at the time of payment the contributor is no longer liable where one of several joint sureties pays for another, or where the surety pays against one but not the others.

In order to entitle himself to contribution that a surety shall have paid the debt as soon as, but not before, the creditor has received the share which as between the sureties he ought to bear.<sup>61</sup> The reason is that he has paid more than his share and has a right to contribution by such payment he has released the others and hence they ought to reimburse him for his share of his loss; and, though he is not a surety because of an agreement with the creditor can be under no obligation to the creditor unless by contract or by estoppel he has subjected

442; *Enicks v. Powell*, 2 Strob. E. 196; *Odom v. Owens*, 2 Baxt. 44; *Remage v. Marple*, 76 W. Va. 37, 85 S. E. 663.

<sup>60</sup> See *infra*, § 1286.

<sup>61</sup> *Davies v. Humphreys*, 6 M. W. 153; *Ex parte Snowden*, 17 Cl. D. 44; *Stirling v. Burdett*, [1911] Ch. 418; *Preslar v. Stallworth*, 3 Ala. 402, 405; *Richter v. Henningsen*, 110 Cal. 530, 42 Pac. 1077; *Le Paris v. Wilmington Trust Co.*, (Dec. 1918), 104 Atl. 691, 1 A. L. R. 135; *Robinson v. Jennings*, 7 Bush 63; *Hooper v. Hooper*, 81 Md. 155, 17 Atl. 508, 48 Am. St. Rep. 496; *Pass v. Granada County*, 71 Miss. 426, 14 So. 447; *Singleton v. Townsend*, 45 Mo. 379; *Singleton v. Shepherd*, (Mo. App. 1916), 183 S. W. 1077.

### § 1279. Contribution where sureties are liable for different amounts.

Not infrequently sureties by their contracts limit the amount of their liability to a fixed sum, and co-sureties sometimes thus fix different limits for themselves or sign bonds with different penalties. In such a case where one surety pays more than his proportion of the debt, the contribution between the sureties must be in proportion to their several contractual liabilities, that is if one surety contracts to be answerable for the common debt to the extent of \$10,000 and another to the extent of \$5,000, the contribution must be so adjusted that the former pays two-thirds of the debt and the latter one-third.<sup>63</sup>

procured by the principal's fraud. The court held that the former having paid the judgment could not recover from the latter, and added:—

"If the rule be stated in the form that the utmost extent of the claim of a surety who has made payment is subrogation to the rights of the creditor, so that he will rank against the co-surety as would the main creditor, as was said in *Russell v. Faylor*, 1 Ohio St. 327, 330, 59 Am. Dec. 631, the same conclusion is reached. Another phase of this principle is shown by the cases which hold that a surety, who has had no notice of an action against a co-surety, may show in an action by such co-surety against him any legal defence which he might have shown in an action against himself on the bond. *Briggs v. Boyd*, 37 Vt. 534, 539; *Lowndes v. Pinckney*, 1 Rich. Ch. 155, 178, 179; *Deering v. Winchelsea*, 2 B. & P. 270. Although the universal accuracy of these last two statements may be doubted (*Warner v. Morrison*, 3 Allen, 566, 568), they are sound as applicable to the facts here disclosed.

"This conclusion does not depend upon the doctrine of *res judicata*,

but flows from fundamental conceptions of the law of suretyship.

"The sentence in *Clapp v. Rice*, 15 Gray, 557, at page 559, 77 Am. Dec. 387, that the 'discharge of one' co-surety 'from his principal obligation, if the others are not discharged, will not release him from the liability to contribute to their indemnity,' was used in a quite different connection relating to the short statute of limitations in favor of the estate of a deceased co-surety as to whose original liability there was no question. This statement cannot be wrested from its connection, and distended to other facts for which it was not intended. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 455, 111 N. E. 386." See further, *infra*, § 1286.

<sup>63</sup> *United States Fidelity, etc., Co. v. Naylor*, 237 Fed. 314, 322, 151 C. C. A. 20, citing *Armitage v. Pulver*, 37 N. Y. 494; *Jones v. Blanton*, 41 N. C. 115 (6 Ired. Eq.), 51 Am. Dec. 415; *Loring v. Bacon*, 57 Mass. (3 Cush.) 465, 468; *Deering v. Winchelsea*, 2 Bos. & Pul. 270; *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677; *Moore v. Boudinot*, 64 N. C. 190. See also *Young v.*



compelled to pay, holds security for his indemnity will not bar recovery in an action for contribution, except to the extent that payment has been realized from the security.<sup>66</sup> After the recovery of contribution the contributing surety may seek the benefit of the security, and any sums realized by the party who obtained contribution must be accounted for. The obligation to share security does not continue after the sureties have finally contributed the amounts equitably due from each one and if, thereafter, one of them receives property for his indemnity, he need not share the benefit of it.<sup>67</sup> From the duty of a surety who has received security to share the benefit with his co-sureties, it follows that he is under the duties of a fiduciary with reference to his conduct in connection with the security. If he wastes it either wilfully or negligently, he is chargeable with the loss in accounting with his co-sureties.<sup>68</sup>

Where a surety has security to protect him against loss on two claims, he is not obliged to share the benefit of the security, or a ratable portion of it, with a co-surety on one of the claims.<sup>69</sup> It has also been held that a debt due from one surety to the principal is not within the rule requiring the sharing of benefits by co-sureties, and that the indebted

898. But the principle is inapplicable where several sureties bind themselves respectively each for a distinct fraction of a total liability. *Assets Realization Co. v. American Bonding Co.*, 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915 A. 1194.

<sup>66</sup> *Done v. Walley*, 2 Exch. 198; *Anthony v. Percifull*, 8 Ark. 494; *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Bachelder v. Fiske*, 17 Mass. 464; *Mosely v. Fullerton*, 59 Mo. App. 143; *Paulin v. Kaighn*, 29 N. J. L. 480; *Vliet v. Wyckoff*, 42 N. J. Eq. 642, 9 Atl. 679. But see *contra Morrison v. Taylor*, 21 Ala. 779; *Morrison v. Poyntz*, 7 Dana, 307, 32 Am. Dec. 92.

<sup>67</sup> *Harrison v. Phillips*, 46 Mo. 520; *Hall v. Cushman*, 16 N. H. 462, 43

Am. Dec. 562; *Urbahn v. Martin*, 19 Tex. Civ. App. 93, 97, 46 S. W. 291.

<sup>68</sup> *Taylor v. Morrison*, 26 Ala. 728, 62 Am. Dec. 747; *Simmons v. Camp*, 71 Ga. 54; *Frink v. Peabody*, 26 Ill. App. 390; *White v. Carlton*, 52 Ind. 371; *Sanders v. Weelburg*, 107 Ind. 266, 7 N. E. 573; *Teeter v. Pierce*, 11 B. Mon. 399; *Schmidt v. Coulter*, 6 Minn. 492; *Chilton v. Chapman*, 13 Mo. 470; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046; *Kerns v. Chambers*, 3 Ired. Eq. 576; *Neely v. Bee*, 32 W. Va. 519, 9 S. E. 898.

<sup>69</sup> *Titcomb v. McAllister*, 81 Me. 399, 17 Atl. 315. See also *supra*, § 1272. But in *Moore v. Moberly*, 7 B. Mon. 299, it was held that the security must be ratably apportioned to the several debts.

surety if he makes payment may recover his contribution from his co-sureties without regard to such advantages which the surety may derive from his ability to set off against the principal debtor the amount which the latter has paid though in case of the principal's insolvency, it is held that a court of equity having all the parties before it will give relief.<sup>71</sup> And where the debt due from the principal to the principal exceeded in amount the debt which the surety paid he has been denied contribution altogether. It is held no more than just that the surety from whom contribution is sought should be allowed to defeat or reduce his contribution of contribution by means of any indebtedness which he owes to the principal, which can be set off in litigation between them; but it may be desired that a surety sued for contribution should be required to plead in defence by a bill in equity in which the principal is a party.

### § 1282. Co-sureties and successive sureties.

The rights of two parties who are sureties for the same obligation depend on whether they are both sureties for the same principal or whether one is surety for the principal and the other surety for the prior surety. What the rights of one to the other is, depends upon the proper inference to be drawn from their contracts and the circumstances of the case. It is not doubted that it is always possible for two parties to agree with one another on entering into a contract or for sufficient consideration subsequently, that one of them and themselves one shall be primarily liable.<sup>72</sup>

Whether an agreement by a new obligor with the original or principal debtor when signing that he did not become a surety for the principal with a surety who had a prior claim but as surety for the surety, is effectual has been held in various ways.

<sup>70</sup> *Davis v. Toulmin*, 77 N. Y. 280; *Neely v. Bee*, 32 W. Va. 898.  
*Smith v. Dickinson*, 100 Wis. 574, 76 N. Y. 766.

<sup>71</sup> *Davis v. Toulmin*, 77 N. Y. 280; *Reed v. Rogers*, 100 N. Y. 973; *Hayden v. Thra*, 100 N. Y. 973; *Hoyt v. Griggs*, 16 N. W. 745; *Blake v. White*, 13 Ala. 422; 97.

<sup>72</sup> *Bessell v. White*, 13 Ala. 422; 97.

It has been held that the prior surety, by requesting the later surety to bind himself or in some other way, must have consented to the arrangement.<sup>73a</sup> But there seems no sound reason to question the right of a later obligor, who is under no duty to enter into any obligation, to dictate the terms upon which he will bind himself, to agree to become surety for one already bound as surety, rather than a co-surety with him. This does not enlarge the liabilities or vary the obligations of prior signers. Accordingly other decisions, including the more recent ones, allow the creation of such a relation without the knowledge or assent of the prior surety,<sup>73b</sup> and proof of the relation may be made by parol.<sup>73c</sup>

Instances of successive suretyship are common in negotiable instruments,<sup>74</sup> and are also to be found where in the course of legal proceedings to enforce a debt for which both a principal and a surety are bound, a bond with sureties is entered into at the request of the principal. In such a case if the original surety is forced to pay the debt, he is subrogated to the creditor's rights upon the bond, and may enforce it against the surety thereon.<sup>75</sup> And conversely if the surety on the bond pays the debt, he has no right to contribution from the surety on the original debt.<sup>76</sup> These rules are only

<sup>73a</sup> *Whitehouse v. Hanson*, 42 N. H. 9; *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 3 Denio, 130; *Lathrop v. Wilson*, 30 Vt. 604. (Cf. *Adams v. Flanagan*, 36 Vt. 400.) See also *Simmons v. Camp*, 64 Ga. 726; *Fernald v. Dawley*, 26 Me. 470; *Crouse v. Wagner*, 41 Ohio St. 470.

<sup>73b</sup> *Craythorne v. Swinburne*, 14 Ves. 160; *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Baldwin v. Fleming*, 90 Ind. 177; *Houck v. Graham*, 123 Ind. 277, 24 N. E. 113; *Chepeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Schram v. Werner*, 83 Hun, 293; *Oldham v. Broom*, 28 Ohio St. 41; *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Huffman v. Manley* (W. Va.), 98 S. E. 613.

<sup>73c</sup> See cases in the preceding note.

<sup>74</sup> See *supra*, §§ 644, 1163.

<sup>75</sup> *Opp v. Ward*, 125 Ind. 241, 24 N. E. 94, 21 Am. St. Rep. 220; *Kellar v. Williams*, 10 Bush, 216; *Culliford v. Walser*, 158 N. Y. 65, 705, 52 N. E. 648, 53 N. E. 1124, 70 Am. St. Rep. 437; *Schnitzel's Appeal*, 49 Pa. 23, 78 Am. Dec. 477; *Winchester v. Beardin*, 10 Humph. 247, 51 Am. Dec. 702; *Hanner v. Douglass*, 4 Jones Eq. 262; *Denier v. Myers*, 20 Oh. St. 336; *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177, 7 S. E. 204. In Maine and Massachusetts, however, the principles of subrogation are not applied as between sureties on successive obligations in judicial proceedings. *Morse v. Williams*, 22 Me. 17; *Holmes v. Day*, 108 Mass. 563.

<sup>76</sup> *Fidelity & Deposit Co. v. Bowen*, 123 Ia. 356, 98 N. W. 897, 6 L. R. A.

applicable, however, where the second surety at the request of the principal only. If the transaction was entered into at the express or implied request of the original surety as well as of the principal, then on paying the debt is entitled to be subrogated to the original surety's right against the original surety.<sup>77</sup>

**§ 1283. A surety who pays unnecessarily is entitled to indemnity or contribution.**

If a surety is under no obligation to pay a debt, he is a volunteer if he makes payment, and though the transaction takes the form of a purchase and taking from the creditor he may become owner of the debt and enforce it against the debtor, there is no obligation of contribution or indemnity.<sup>78</sup> The application of this rule to cases where the surety is under an imperfect obligation though one not enforceable against him is true. It has been held that one who has made an oral promise to fulfill his promise though unenforceable, and releases the principal the amount paid.<sup>79</sup> Similarly a surety whom the Statute of Limitations has run has been held to recover from the principal against whom the claim is barred;<sup>80</sup> and where a claim against the principal was still valid, a surety discharged by alteration of the contract,<sup>81</sup> by an extension of time given by the principal,<sup>82</sup> a failure to make proper protest,<sup>83</sup>

(N. S.) 1021; *Daniel v. Joyner*, 3 Ired. Eq. 513; *Dent v. Wait's Adm'r*, 9 W. Va. 41; *Hammock v. Baker*, 3 Bush, 208.

<sup>77</sup> *Dessar v. King*, 110 Ind. 69, 10 N. E. 621; *Dillon v. Scofield*, 11 Neb. 419, 9 N. W. 554; *Hartwell v. Smith*, 15 Oh. St. 200; *Yeager's Appeal* (Pa.), 8 Atl. 225; *Coffman v. Hopkins*, 75 Va. 645. In Louisiana the assumption seems always made in favor of the second surety that his obligation was entered into on the faith of the prior obligation of the first surety. *Howe v. Fraser*, 2 Rob. (La.) 424. See also *Smith v. Anderson*, 18 Md. 520.

<sup>78</sup> *Sleigh v. Sleigh*, 112 Ala. 112; *Murray v. Curtis*, 55 Cal. 49; *Ritchey*, 49 Ind. 791; *Hinton*, 14 Lea, 22; *Rich*, 56 Vt. 324, 791.

<sup>79</sup> *Beal v. Brown*,

<sup>80</sup> *McClatchie v. Brown*, 435, 7 N. W. 76.

<sup>81</sup> *Houck v. Graham*, 11 N. E. 594.

<sup>82</sup> *Brown v. May*, 247, 93 Atl. 1023.

<sup>83</sup> *Tredway v. Anderson*, 48 N. W. 956.

give notice required by law,<sup>84</sup> has been allowed on payment of the debt to recover indemnity or contribution. Such decisions seem sound, though at variance with statements frequently made that unless the surety's payment was under legal necessity he cannot recover. Where the principal or co-surety is still bound to the creditor he is not injured if the surety pays the debt and recovers from him. Therefore, where there is a moral obligation on the part of the surety, he should not be required, on peril of acquiring no right over, to refuse to pay the debt. The surety, however, cannot be allowed to extend the obligation of the creditor merely for his own satisfaction. Accordingly if the Statute of Limitations has run in favor both of the principal and the surety, a payment thereafter by the surety cannot be recovered from the principal nor can contribution be recovered from a co-surety against whom the creditor no longer had at the time of the payment an enforceable right.<sup>85</sup>

The mere fact that the Statute of Limitations has run against the creditor in favor of the principal debtor or a co-surety prior to the action for indemnification or contribution will not defeat the action if the Statute had not run when payment was made.<sup>86</sup>

It has been said <sup>87</sup> that "the liability of the principal cannot

<sup>84</sup> *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

<sup>85</sup> *Hatchett v. Pegram*, 21 La. Ann. 722; *Godfrey v. Rice*, 59 Me. 308, 309; *Hooper v. Hooper*, 81 Md. 155, 174, 31 Atl. 508; *Barnsback v. Reiner*, 8 Minn. 59; *Gronna v. Goldammer*, 26 N. Dak. 122, 143 N. W. 394, Ann. Cas. 1916 A. 165; *Wheatfield v. Brush Valley*, 25 Pa. 112; *Cocke v. Hoffman*, 5 Lea, 105, 40 Am. Rep. 23; *Glasscock v. Hamilton*, 62 Tex. 143, 153; *Turner's Adm'r v. Thom*, 89 Va. 745, 17 S. E. 323. For other illustrations of the same principle, see *infra*, § 1286, n. 10.

<sup>86</sup> *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Gardner v. Brooke*, [1897] 2 Ir. Rep. 6; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Wood v. Leland*, 1 Met. 387; *Hard v. Mingle*, 206 N. Y. 179, 99 N. E. 542, 42 L. R. A. (N. S.) 1131;

*Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. Rep. 669; *McCormick v. Sener*, 200 Pa. 11, 49 Atl. 311; *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020; *Cawthorne v. Weisinger*, 6 Ala. 714; *Mentzer v. Burlingame*, 78 Kans. 219, 97 Pac. 371, 18 L. R. A. (N. S.) 585; *Crosby v. Wyatt*, 23 Me. 156; *Seabury v. Sibley*, 183 Mass. 105, 66 N. E. 603; *Sibley v. McAllaster*, 8 N. H. 389; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 431; *Koelsch v. Mixer*, 52 Oh. St. 207, 39 N. E. 417; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *Marshall v. Hudson*, 9 Yerg. 57; *Reeves v. Pulliam*, 7 Baxt. 119; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

<sup>87</sup> *Lane v. Westmoreland*, 79 Ala. 372, 374.

be increased nor accelerated by the voluntary act of the surety. He must wait until he is called to pay, and subject to be coerced to pay. Of course, this is an exception to the general rule; for if there be special stipulations which determine the mode and measure of liability; if a defence has arisen at the date when the claim would mature, a surety who has paid it before maturity may recover contribution after the date of maturity.<sup>80</sup>

#### § 1284. Measure of surety's recovery.

"Where a surety is sued with his principal, or sued alone and notifies the principal so as to defend or to furnish a surety with a defence against the surety is the measure of his damages against the principal."<sup>80</sup> And so where a co-surety is joined and contribution is afterwards claimed.<sup>91</sup> Unless a co-surety is thus in effect made responsible for the judgment or unless his promise is in terms to be bound by the result of the litigation, the correctness of the judgment may be questioned in a subsequent action for contribution.<sup>92</sup> Not only may a surety pay the debt which has become liable on the obligation without

<sup>80</sup> Citing Brandt on Suretyship, §§ 191, 194; Reynolds v. Magness, 2 Ired. Law, 26; St. Albans v. Curtis, 1 D. Chipm. 164; Gennings v. Norton, 35 Me. 308; Gilbert v. Wiman, 1 Comst. 550, 49 Am. Dec. 359; Gibbs v. Menard, 6 Paige, 258; Shepard v. Shepard, 6 Conn. 37; Duncan v. Keiffer, 3 Bin. 126; M'Lean v. Ragsdale, 31 Miss. 701; Hollinsbee v. Ritchey, 49 Ind. 261; Pope v. Davidson, 5 J. J. Marsh. 400.

<sup>81</sup> Golsen v. Brand, 75 Ill. 148; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545; Tillotson v. Rose, 11 Met. 299; Felton v. Bissel, 25 Minn. 15; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Armstrong v. Gilchrist, 2 Johns. Cas. 424; Williams v. Williams, 5 Oh. 444; Craig v. Craig, 5 Rawle, 91; Guckenheimer & Bros. Co. v. Kann, 243 Pa. 75, 89 Atl. 807.

<sup>80</sup> Hare v. Grant, 100 N. H. 407. And see Smith v. Coe, 100 N. H. 407; Rice v. Rice, 100 N. H. 407; Littleton v. Rich, 100 N. H. 179, 66 Am. Dec. 179.

<sup>91</sup> Love v. Gibson, 100 N. H. 179, 66 Am. Dec. 179. If the co-surety is not bound by the result of the litigation, he is not bound by the judgment against his co-surety. Keane v. Keane, 100 N. H. 207, 39 N. H. 207.

<sup>92</sup> Cathcart v. Fox, 100 N. H. 179, 66 Am. Dec. 179. Guay v. Eastman, 100 N. H. 840; Thomas v. Thomas, 100 N. H. 405, 69 Am. Dec. 179. Hatz, 52 Pa. 407. Pinckney, 1 Rich. 407. Also Smith v. Coe, 100 N. H. 407.

claim, and by subrogation or otherwise recover indemnity<sup>93</sup> or contribution,<sup>94</sup> but if the surety does without reasonable grounds contest liability, he cannot charge the principal or co-surety with costs incurred in the action;<sup>95</sup> and if the surety's property is sold at a sacrifice to satisfy the creditor's execution, the surety can recover only the amount which the property actually brought.<sup>96</sup> The surety, however, may include in his claim for indemnity or contribution costs incurred in a defence reasonably undertaken,<sup>97</sup> or incurred in an action in which the principal or co-surety was a co-defendant.<sup>98</sup>

**§ 1285. The surety is limited to reimbursement.**

The law is solicitous to insure the surety, by the various remedies it allows, reimbursement as against the principal debtor, and the enforcement against co-sureties of their due share of any loss; but on the other hand it forbids the surety

<sup>93</sup> *Fishback v. Weaver*, 34 Ark. 569, 580; *Odlin v. Greenleaf*, 3 N. H. 270; *Bradley v. Burwell*, 3 Denio, 61.

<sup>94</sup> *Pitt v. Purssord*, 8 M. & W. 538; *Love v. Gibson*, 2 Fla. 598; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562; *Warner v. Morrison*, 3 Allen, 566; *Bradley v. Burwell*, 3 Denio, 61; *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. 275.

<sup>95</sup> *Fisher v. Fallows*, 5 Esp. 171; *Pierce v. Williams*, 23 L. J. Exch. 322; *John v. Jones*, 16 Ala. 454, 462; *Beckley v. Munson*, 22 Conn. 299; *Comegys v. State Bank*, 6 Ind. 357; *Newcomb v. Gibson*, 127 Mass. 396, 399; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Van Petten v. Richardson*, 68 Mo. 379; *Boardman v. Paige*, 11 N. H. 431; *Stothoff v. Dunham*, 4 Harr. (N. J.) 181; *Bright v. Lennon*, 83 N. C. 183, 188; *Wynn v. Brooke*, 5 Rawle, 106. But see *Kemp v. Finden*, 12 M. & W. 421; *Van Winkle v. Johnson*, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495; *Briggs v. Boyd*, 37 Vt. 534.

<sup>96</sup> *Taylor's Ex. v. Jefferson*, 167 Ky. 454, 180 S. W. 801.

<sup>97</sup> *United States Fidelity, etc., Co. v. Naylor*, 237 Fed. 314, 151 C. C. A. 20; *Carter v. Fidelity, etc., Co.*, 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 41; *Wagenseller v. Prettyman*, 7 Ill. App. 192, 197; *Bosley v. Taylor*, 5 Dana, 157; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Bright v. Lennon*, 83 N. C. 183; *Cleveland v. Covington*, 3 Strob. 184; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92; *Briggs v. Boyd*, 37 Vt. 534.

<sup>98</sup> *Kemp v. Finden*, 12 M. & W. 421; *Security Ins. Co. v. St. Paul Ins. Co.*, 50 Conn. 233; *Bosley v. Taylor*, 5 Dana. 157; *Davis v. Emerson*, 17 Me. 64; *Newcomb v. Gibson*, 127 Mass. 396; *Boardman v. Paige*, 11 N. H. 431; *Stothoff v. Dunham*, 4 Harr. (N. J.) 181, 185; *Bright v. Lennon*, 83 N. C. 183; *Van Winkle v. Johnson*, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495; *McKenna v. George*, 2 Rich. Eq. 15; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Marsh v. Harrington*, 18 Vt. 150.

to seek anything beyond these limits. He can in regard to the claim either against the principal or a co-surety. Therefore, the surety's right on the obligation of indemnity is limited to the surety and if he obtains a discharge of the debt without the creditor in full, he can recover only his actual contribution.

Similarly if he seeks to be subrogated to the creditor's rights he must give the principal the advantage of a payment made with the creditor.<sup>1</sup> Nor are his rights affected if instead of paying the debt, he purchases at auction the creditor's claim and seeks to enforce it for its face against the principal.<sup>2</sup> The same principle is applied to the contribution among co-sureties. The calculation of the amount a co-surety is liable must be based on the amount actually made by the surety seeking contribution, not on the full amount of the debt where it has been settled for less.

**§ 1286. When a surety who has paid the debt is subrogated to the creditor's rights against the principal or co-surety, the defence of the latter is not available.**

As has been seen,<sup>4</sup> a surety may sometimes be subrogated to the creditor's rights against his principal if the principal is not, and similarly cases may be found where one surety is liable and a co-surety is not. The following cases illustrate the principle.

<sup>1</sup> *Reed v. Norris*, 2 M. & Cr. 361; *Martin v. Ellerbe*, 70 Ala. 326; *Jordan v. Adams*, 7 Ark. 348; *Coggeshall v. Ruggles*, 62 Ill. 401; *Goodwin v. Davis*, 15 Ind. App. 120, 43 N. E. 881; *Crozier v. Grayson*, 4 J. J. Marsh. 514; *Gillespie v. Creswell*, 12 Gill & J. 36; *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Bonney v. Seely*, 2 Wend. 481; *Faires v. Corkerell*, 88 Tex. 428, 434, 437, 31 S. W. 190, 639, 28 L. R. A. 528; *Kendrick v. Forney*, 22 Gratt. 748; *Southall v. Farish*, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; *Matthews v. Hall*, 21 W. Va. 510.

<sup>2</sup> *Dinkgrave's Succession*, 31 La. Ann. 703; *Eaton v. Lambert*, 1 Neb. 339.

<sup>3</sup> *Dorsey v. Creditors*, 7 Mart.

(N. S.) 498; *Pace v. N. C.* 550; *Burton v. Gratt.* 914. But in *Land*, 107 Mass. 581, the indorser who had taken the note at a discount was not allowed to enforce it for its face against the maker.

<sup>4</sup> *Owen v. McGowan*, 16 Smith v. Pitts, 16 So. 402; *Williams v. Berry*, 365, 59 Pac. 762, 60; *Paul v. Berryman v. McCurdy*, *Fuselier v. Babin*, 764; *Sinclair v. R*, 146; *Acers v. Curt*, 4 S. W. 551; *T*, 12 Gratt. 642.

<sup>5</sup> *Supra*, §§ 1213

cumstances whether the surety who is liable can recover indemnity from the principal or contribution from the co-surety depends upon the nature of the latter's defence. If the principal or co-surety is an infant his infancy will be as good a defence to an action by a surety who has paid the debt as it would be to an action by the principal.<sup>5</sup> On the other hand, the principal or co-surety may be excused from liability to the creditor because of the Statute of Limitations, but the surety who pays may still be liable. Under such circumstances the surety, if forced to pay, may recover indemnity from the principal,<sup>6</sup> and under similar circumstances may recover contribution from a co-surety.<sup>7</sup> So the death of one joint co-surety, though it relieves his estate from liability to the creditor will not relieve it from an obligation to contribute to a co-surety who pays more than his share of the debt.<sup>8</sup> The defence of bankruptcy is specifically provided for by the Bankruptcy Act.<sup>9</sup> The vital questions where the surety seeks re-

<sup>5</sup> See *supra*, § 1278.

<sup>6</sup> *Hooks v. Branch Bank*, 8 Ala. 580; *Sichel v. Carrillo*, 42 Cal. 493; *Reid v. Flippen*, 47 Ga. 273; *Gieseke v. Johnson*, 115 Ind. 308, 311, 17 N. E. 573; *Brought v. Griffith*, 16 Iowa, 26, 33; *Leslie v. Compton*, 103 Kan. 92, 172 Pac. 1015; *Godfrey v. Rice*, 59 Me. 308; *Bullock v. Campbell*, 9 Gill, 182; *Barnesback v. Reiner*, 8 Minn. 59; *Scott v. Nichols*, 27 Miss. 94; *Miller v. Woodward*, 8 Mo. 169; *Marshall v. Hudson*, 9 Yerg. 57; *Brooks*, 12 Heisk. 12; *Bevill v. Boyd*, 16 Tex. Civ. App. 491, 495-496, 41 S. W. 670, 42 S. W. 318; *Norton v. Hall*, 41 Vt. 471.

<sup>7</sup> *Preslar v. Stallworth*, 37 Ala. 402; *Williams v. Ewing*, 31 Ark. 229; *May v. Vann*, 15 Fla. 553; *Hill v. Morse*, 61 Me. 541; *Wood v. Leland*, 1 Met. 387; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Kelly v. Sproul*, 153 Mich. 691, 117 N. W. 327, 15 Ann. Cas. 1029; *Burton v. Rutherford*, 49 Mo. 255; *Frew v. Scoular*, 101 Neb. 131, 162 N. W. 496, L. R. A.

1917 F. 1065; *Boardman v. Paige*, 11 N. H. 431; *Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. Rep. 669; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *Knotts v. Butler*, 10 Rich. Rq. 143; *Reeves v. Pulliam*, 7 Baxt. 119, 9 Baxt. 153; *Fairies v. Cockerell*, 88 Tex. 428, 434, 31 S. W. 190, 639, 28 L. R. A. 528; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791. Contrary decisions are: *Shelton v. Farmer*, 9 Bush, 314; *Cochran v. Walker's Ex.*, 82 Ky. 220, 56 Am. Rep. 891.

<sup>8</sup> *Ashby v. Ashby*, 7 B. & C. 444, 449, 451; *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *McKenna v. George*, 2 Rich. Eq. 15; *Stephens v. Meek*, 6 Lea, 226; *Tarr v. Ravenscroft*, 12 Gratt. 642, 652. See also *Hecht v. Skaggs*, 53 Ark. 291, 13 S. W. 930, 23 Am. St. Rep. 192. But see *contra*, *Waters v. Riley*, 2 Har. & G. 305; *Kennedy v. Carpenter*, 2 Whart. 344.

<sup>9</sup> See *infra*, § 1992.

imbursement or contribution are these: Is between him and the principal or co-surety to make liable, and if so is there a defence or if there is no contract, has the surety's pay enriched the principal or co-surety that rec allowed?

As has been seen,<sup>9a</sup> where the defence of co-surety is of such a character that the sure debt could have set up the defence effectively t he cannot, if he knew the facts upon which based, recover indemnity or contribution if he But if the surety pays in good faith in i which would furnish a defence to the credit entitled to recover indemnity,<sup>11</sup> or contributio

### § 1287. Laches.

The right of subrogation may be lost laches if the rights of innocent third persons i so may the right of contribution.<sup>14</sup>

<sup>9a</sup> See *supra*, § 1283, n. 85.

<sup>10</sup> *Whitehead v. Peck*, 1 Ga. 140; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Craven v. Freeman*, 82 N. C. 361; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. Dec. 631; *Davis v. Bauer*, 41 Oh. St. 257; *Worthington v. Peck*, 24 Ont. 535. See also *Halsey v. Murray*, 112 Ala. 185, 20 So. 575; *Bancroft v. Abbott*, 3 Allen, 524.

<sup>11</sup> *Gasquet v. Oakey*, 19 La. 76; *Hyde v. Miller* (N. Y. App. Div.),

60 N. Y. S. 974

Oh. St. 327, 59

son v. Brennan,

<sup>12</sup> *Cave v. Bur*  
*born v. Fletcher*,  
Rep. 562; *Wai*  
*Allen*, 566; *God*  
Vict. L. R. 70.

<sup>13</sup> *Douglass' A*  
*In re Searight's*  
29 Atl. 973.

<sup>14</sup> *Owen v. M*









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